87-629
No.

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In The
Supreme Court of the United States
October Term, 1987

AMERICAN NATIONAL BANK & TRUST COMPANY, not individually, but solely as Trustee under Trust Number 33832, and PAXTON LANDFILL CORPORATION, an Illinois corporation,

Petitioners,

v.

CITY OF CHICAGO, a municipal Illinois corporation, and ZONING BOARD OF APPEALS FOR THE CITY OF CHICAGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 13, 1987

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QUESTIONS PRESENTED

1. Where the Court of Appeals for the Seventh Circuit has:

a.) ruled that persons in Illinois denied rights in administrative proceedings must institute action for administrative appeal, flawlessly, in 35 days, or else permanently lose substantial federal Constitutional rights, contrary to past decisions of the United States Supreme Court and the federal Courts of Appeals; and,

b.) resolved that courts of the State of Illinois should hold dismissals for lack of subject matter jurisdiction to be claim preclusive, directly contrary to existing decisions of the Supreme Court of Illinois and Illinois appellate courts;

should the Supreme Court reverse the decision of the Seventh Circuit?

2. Where a state court judgment is a dismissal resulting from an unyielding and abrupt (e.g., 35 day) period for satisfying an arcane formality imposed by state law (e.g., initiation of action against witnesses as well as real parties), will the dismissal preclude federal Constitutional claims, such as Section 1983 claims (42 U.S.C. 1983), known to be substantial; or

will the guarantee of a full and fair opportunity to litigate Constitutional claims, existing under force of *Haring v. Prosise*, 462 U.S. 306 (1983), protect the claims against preclusion?

3. Must the federal courts heed explicit statements of a state court judgment as to the nature of that judgment, and state court decisions which declare that judgments of the stated nature are not claim preclusive; or

may the federal courts resolve the judgment to be claim-preclusive based upon "the difference between jurisdictional and other dismissals in terms" "not articulated" by "[t]he courts of [the state]"?

RULE 21.1 AND 28.1 LISTING

In compliance with Supreme Court Rules of Practice 21.1 and 28.1, Petitioners, American National Bank & Trust Co. (not individually, but solely as Trustee under Trust Number 33832), and Paxton Landfill Corporation, an Illinois corporation, furnish the following information:

(1) the full names of all parties represented by the undersigned in the case are American National Bank & Trust Co. and Paxton Landfill Corporation;

(2) Plaintiff-petitioner American National Bank & Trust Co. is owned by First Chicago Corporation and is not otherwise affiliated with any publicly held companies; Plaintiff-petitioner Paxton Landfill Corporation is not affiliated with or owned by any publicly held companies;

(3) The names and addresses of all law firms whose partners or associates have appeared for the petitioners in the courts below, or who are expected to appear in this Court are:

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(4) Because this Petition for Certiorari draws into question the Constitutionality of an Illinois statute, 28 U.S.C. Section 2403(b) may be applicable. Accordingly, a copy of this petition shall be served on the Attorney General of the State of Illinois.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 21.1 AND 28.1 LISTING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

ANALYSIS 6

1. The Effect Of The Decision Was To Limit Redress Of Denial Of Federal Constitutional Rights In Administrative Proceedings In Illinois By Making Their Assertion Subject To Flawless Institution Of Action For Administrative Appeal In 35 Days 6

2. The Federal Court Of Appeals Has Decided A Federal Question In Conflict With Applicable Decisions Of The United States Supreme Court . . . 7

3. The Federal Court Of Appeals Has Rendered A Decision In Conflict With Those Of Other Federal Courts Of Appeals On The Same Matter 11

4. The Decision Calls For An Exercise Of The Power Of Supervision Of The United States Supreme Court Because The Supreme Court of Illinois And Appellate Courts of Illinois, Addressing The Precise Issue Determined By The Seventh Circuit, Have Resolved The Issue to the Contrary 12

Page

CONCLUSION 16

APPENDIX 1a

TABLE OF AUTHORITIES

Cases: *Page*

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411 (1980) 7,8,9,16

Amico v. New Castle County, 770 F.2d 1066 (3d Cir. 1985), *affirming* 101 F.R.D. 472 (D. Del. 1984). . . 11,12

Burnett v. Grattan, 468 U.S. 42, 104 S.Ct. 2924 (1984) 10,11,16

Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 17 S.Ct.581 (1897) 4

Fredman Brothers Furniture Co. v. Department of Revenue, 109 Ill. 2d 202, 486 N.E.2d 893 (1985). . . . 13

Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368 (1983) 7,8,9

Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978) 12

Kimmel v. Texas Commerce Bank, 817 F.2d 39 (7th Cir. 1987) 13

Migra v. Warren City School District, 465 U.S. 75, 104 S.Ct. 892 (1984) 8,9,16

O'Hare International Bank v. Zoning Board of Appeals, 37 Ill.App.3d 1037, 347 N.E.2d 440 (1st. Dist. 1976). 14,15

O'Hare International Bank v. Zoning Board of Appeals, 8 Ill.App.3d 764, 291 N.E.2d 349 (1st. Dist. 1976). 14

Cases: *Page*

Pauk v. Board of Trustees, 654 F.2d 856 (2d Cir. 1981). 11,12

United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 73 S.Ct. 67 (1952). 13

Constitutional Provisions and Statutes

Page

United States Constitution, Amendment 5

United States Constitution, Amendment 14

28 U.S.C. 1738 5,6,7,8,9

42 U.S.C. 1983 5,7,8,9

42 U.S.C. 1988 4

Ill. Rev. Stat., 1983, ch.110, Section 3-103 4

Ill. Rev. Stat., ch.110A, ¶273 15

Other

Rule of Practice of the United States Supreme Court 17.1 3

Rule of Practice of the United States Supreme Court 17.1(c) 3

Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. Rev.59 (1984). 9

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, American National Bank & Trust Company, as Trustee, and Paxton Landfill Corporation (together, "Paxton"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered July 13, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not reported, and is reprinted in the appendix at page 1a.

The memorandum decision of the United States District Court for the Northern District of Illinois (Shadur, D.J.) is reported at 636 F. Supp. 374, and is reprinted in the appendix at page 13a.

The opinion of the Appellate Court of Illinois, First District, is reported at 132 Ill. App. 3d 570, 478 N.E.2d 1, and is reprinted in the appendix at page 35a. The Order of the Circuit Court of Cook County, First Circuit, granting summary judgment for plaintiff on Count IV, the issue in question, is reprinted in the appendix at page 39a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered July 13, 1987, is invoked under 28 U.S.C. Sec. 1254(1).

The Rules of the Supreme Court include the following as indicative of the character of reasons which the Supreme Court will consider in the exercise of its discretion to grant writs:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a . . . federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Supreme Court Rule of Practice 17.1 (1984)

Paxton seeks exercise of the discretion of the Supreme Court to grant a Writ of Certiorari as to the decision of the federal court of appeals of July 13, 1987 because, *inter alia*, (1) the federal court of appeals has decided a federal question in conflict with applicable decisions of the United States Supreme Court[1]; (2) the federal court of appeals has rendered a decision in conflict with the decision of other federal courts of appeals on the same matter; and (3) the decision calls for an exercise of the Supreme Court's power of supervision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 5

United States Constitution, Amendment 14

28 U.S.C. Sec. 1738

42 U.S.C. Sec. 1983

42 U.S.C. Sec. 1988

Ill. Rev. Stat. 1983, ch. 110, section 3-103

The text of each statute appears in the appendix beginning at page 40a.

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[1] To the extent the Court of Appeals is viewed as having decided a federal question *not* in conflict with decisions of the United States Supreme Court, then the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court. This is an additional reason which should be considered by the Supreme Court on the Paxton petition. Rules of Practice of the Supreme Court of the United States 17.1.(c).

STATEMENT OF THE CASE

Paxton, an established landfill operator in Chicago, Illinois, sought renewal before the Chicago Zoning Board of Appeals of a zoning variance that had been routinely renewed in the past. An unexpected denial of the variance by the Chicago Zoning Board of Appeals was contested by Paxton in an administrative review proceeding in the state trial court, the Circuit Court of Cook County. The Circuit Court described the Zoning Board's action as "not supported by any competent evidence" and ordered renewal of the variance. On appeal by the City of Chicago, the appellate court of Illinois ruled that the state trial court had "lacked jurisdiction." Infra at 13. The Illinois Administrative Review Act, Ill. Rev. Stat. 1983, ch. 110, section 3-103 required the institution of the administrative review proceeding in 35 days. The Illinois Appellate Court held the Circuit court lacked jurisdiction, even though the action had been instituted in 35 days, because issuance of disputed summonses on witnesses to the Zoning Board proceeding had not been procured within the 35 days.

Paxton petitioned the Supreme Court of Illinois for review of the state appellate court decision, but permission to appeal was denied.

This action was brought by Paxton in the United States District Court for the Northern District of Illinois pursuant to 42 U.S.C. Sec. 1983 and 1988 and the Fifth and Fourteenth Amendments to the Constitution. Jurisdiction was based on 28 U.S.C. Sec. 1331 and 1343(3). Paxton contended before the district court, for the first time, that the zoning classification by the Chicago Zoning Board of Appeals violated the Due Process Clause of the Fourteenth Amendment and was an unconstitutional taking under the Fifth Amendment to the extent the amendment has been applied to the states. Paxton contended the same as to the failure to renew the variance. *See Chicago, Burlington & Quincy R.R. v. Quincy R.R. v. Chicago*, 166 U.S. 226, 233-41, 17 S.Ct. 581, 583-86 (1897). On a motion to dismiss, the

district court ruled that the federal Constitutional claims, even if meritorious, were barred by principles of claim preclusion (*res judicata*) applicable in Illinois. The district court held that Paxton's Constitutional claims were forever precluded because they could have been brought in the administrative review proceeding, within the 35 day period permitted for that proceeding, and were forfeited with Paxton's claim for administrative review for lack of proper issuance of the disputed witness summonses.

On appeal, the Seventh Circuit Court of Appeals on July 13, 1987 entered judgment and issued an opinion affirming the district court's ruling of claim preclusion. The Court of Appeals applied 28 U.S.C. Section 1738 to bar Paxton's claim from being brought in federal court. The Court of Appeals found the issue whether 42 U.S.C. Section 1983 requires that a federal forum be provided for Constitutional claims to be wholly separate from the issue of *res judicata* under Illinois law. *Slip op.* at 4, *infra* at 4a.

As a result, Paxton's Constitutional claims have never been heard on the merits in any court, state or federal. Paxton stands to lose its existence for lack of a zoning variance, where the only court to consider the merits of Paxton's state law claim found the denial of the variance to be wrongful.

ANALYSIS

1. The Effect Of The Decision Was To Limit Redress Of Denial Of Federal Constitutional Rights In Administrative Proceedings In Illinois By Making Their Assertion Subject To Flawless Institution Of Action For Administrative Appeal *In 35 Days*

The decision of the Seventh Circuit Court of Appeals was that an earlier state appellate court dismissal of an administrative appeal by Paxton[2], for failure to file witness summonses in a 35 day period, was *res judicata* as to Paxton's federal Constitutional claims, including a 42 U.S.C. Section 1983 (denial of civil rights) claim. The federal court of appeals ruled that the dismissal was *res judicata* because 28 U.S.C. 1738 (full faith and credit) required the federal courts to give the dismissal the same effect it would have received in an Illinois state court and further ruled that the dismissal would have been *res judicata* in an Illinois state court.

The effect of this decision was to deny Paxton *any* consideration of its federal Constitutional claims in *any* forum after the 35 day period, unless it had filed its administrative appeal within that period and complied with all matters of required procedure in that short period. The effect was to limit the federal Constitutional claims of Paxton by requiring Paxton to institute administrative appeal, flawlessly, in 35 days.[3] The effect was to abrogate the federal Constitutional rights of Paxton and all persons similarly situated. Persons similarly situated are all persons in Illinois denied rights in administrative proceedings.

Under the rule thus announced by the Court of

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[2] Of a denial of a zoning variance.

[3] The federal appeals court justified this result by asserting that "A firm with counsel can move fast." *Slip op.* at 5, *infra* at 5a.

Appeals for the Seventh Circuit, all persons denied rights in state agency administrative proceedings in Illinois must institute action for administrative appeal, flawlessly, or else forfeit their federal constitutional rights, permanently, *in 35 days*. This burdensome requirement flies in the face of the decisions of the Supreme Court, the federal Courts of Appeals, Illinois law and important federal policy protecting the right of litigants to bring Constitutional claims in a full and fair proceeding.

2. The Federal Court Of Appeals Has Decided A Federal Question In Conflict With Applicable Decisions Of The United States Supreme Court

28 U.S.C. Section 1738 provides that where a state court decision would be accorded *res judicata* effect in state court, a party may not bring the identical claim in federal court. However, 42 U.S.C. Section 1983 supports an exception that state law cannot govern where it is inconsistent with the law and policies of 42 U.S.C. Section 1983.

In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1980), the Supreme Court stated that Section 1983 might support an exception to Section 1738 where a state court proceeding did not provide a full and fair opportunity to litigate a Section 1983 claim:

> "[Section] 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims . . . Such an exception . . . would be essentially . . . where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate. . . ."

Allen at 101, 101 S.Ct. at 418.

In *Haring v. Prosise*, 462 U.S. 306, 103 S.Ct. 2368 (1983), the Court definitively confirmed the exception:

> "Title 28 U.S.C. Section 1738 generally requires 'federal courts to give preclusive effect to state-

> court judgments. . . . In federal actions, including Section 1983 actions, a state court judgment will not be given collateral estoppel effect, however, where 'the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.' [*Allen*], at 101, 101 S.Ct. at 418. Moreover, additional exceptions to collateral estoppel may be warranted in Section 1983 actions in light of the 'understanding of Section 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights.' *Ibid.*, *Cf id.* at 95, n. 7, 101 S.Ct. at 415, n. 7; *Board of Regents v. Tomanio*, 446 U.S. 478, 485-86, 100 S.Ct. 1790, 1795-96, 64 L.Ed.2d 440 (1980) (42 U.S.C. Section 1988 authorizes federal courts, in an action under Section 1983, to disregard an otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying Section 1983).

Haring at 313-14, 103 S.Ct. at 2373.

In *Migra v. Warren City School District*, 465 U.S. 75, 104 S.Ct. 892 (1984), the Court held that there is *no* partial repeal of Section 1738 where the litigant *has* had a full and fair opportunity to litigate its Section 1983 claims in the prior state proceeding, but failed to do so. However, the Court carefully distinguished the facts before it from the exception postulated in *Allen* and adopted in *Haring*. Thus, the exception was carefully preserved.

The instant case lies within the exception postulated in *Allen*, resolved to exist in *Haring* and retained in *Migra*. Where state law dictates a result inconsistent with the federal policy underlying Section 1983, 42 U.S.C. Section 1983 mandates that the state law yield to the overriding federal policy in favor of affording litigants a full and fair opportunity to litigate Constitutional grievances. The Illinois state law, interpreted by the federal Court of Appeals to foreclose litigation of Paxton's federal Constitutional claims because all procedural requirements were not completely and per-

fectly satisfied within 35 days, is fundamentally inconsistent with federal policy. Accordingly, 42 U.S.C. Section 1983 requires that the Illinois state law yield and full faith and credit, 28 U.S.C. Section 1738, should not apply.[4]

The decision of the federal Court of Appeals is in conflict with these previous United States Supreme Court decisions. In *Allen*, the United States Supreme Court stated that 42 U.S.C. Section 1983 "might" support an exception to 28 U.S.C. Section 1738 where state procedures are inadequate for the full and fair litigation of a federal Constitutional claim. The Court of Appeals did not discuss this case. In *Haring*, the Court definitively held, as *Allen* had indicated it "might", that Section 1983 supports an exception to Section 1738.[5] The Court of Appeals did not discuss this case. In *Migra*, the Court was careful to retain its statement in *Allen* and distinguish, and thereby retain, *Haring*. The Court of Appeals did not discuss this case.

The decision of the Seventh Circuit also was that 35 days was a Constitutionally acceptable period of limita-

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[4] At least one commentator has analyzed this exception and concluded:

> This review of the history and construction of sections 1738 and 1983 indicates that there is ample justification for the two exceptions to the application of state preclusion rules recognized in *Haring [v. Prosise,* 103 S.Ct. 2368 (1983)]. Thus, when there was not a full and fair opportunity to litigate the claim or issue in the prior proceeding in state court, or when preclusion would contravene the understanding of section 1983 regarding choice of a federal forum, preclusion is not required.

Smith, *Full Faith and Credit and Section 1983: A Reappraisal,* 63 N.C.L. Rev. 59, 106 (1984).

[5] To any extent *Haring* is distinguished as creating a collateral estoppel exception to Section 1738, not a *res judicata* exception, Paxton disputes distinguishability and asserts that if *Haring* is distinguishable, then the federal court of appeals has decided an important question of federal law which should be settled by the United States Supreme Court.

tions for federal Constitutional claims where a person has counsel, because "A firm with counsel can move fast." *Slip op.* at 5 *infra* at 5a. A comparison was made to corporate take-over litigation, in which cases are "begun, slugged out, and decided on appeal in less than 35 days." *Slip op.* at 5, *infra* at 5a. Apart from being a suggestion that *all* federal litigation should engender the whirlwinds which accompany take-over litigation, this wasteful and haphazard policy toward federal Constitutional claims is directly contrary to Supreme Court statements of policy and to the experience of Paxton.[6]

In *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924 (1984), the United States Supreme Court held a six-month period of state law inapplicable to federal civil rights actions. The Court endorsed a policy assuring "the full availability of a judicial forum" for civil rights actions, an availability which was not preserved, according to the Court's reasoning, by a limitation period of six months:

> [B]orrowing an administrative statute of limitations ignores the dominant characteristic of civil rights actions: they belong in court. *McDonald v. West Branch*, 466 U.S. 284, 290, 104 S.Ct. 1799, 1803, 80 L.Ed.2d 302 (1984). Assuring the full availability of a judicial forum necessitates attention to the practicalities of litigation. *Litigating a civil rights claim requires considerable preparation. An injured person must recognize the consti-*

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[6] And is asking too much of all legal counsel. Few, if any, administrative appeals lawyers have the resources to act in the rush-rush manner of the take-over specialists. Such time pressure inhibits counsel both from presenting valid claims most effectively and from detecting meritless claims before leaping into full-scale litigation. It also forces counsel to press potential Constitutional claims from the outset, instead of focusing on non-Constitutional claims, which are more often ultimately determinative. If the court had inquired (it did not), it would have learned that counsel needed more than 35 days to sift through the difficult case law and bring a Constitutional claim.

> *tutional dimensions of his injury.* He must obtain counsel, or prepare to proceed *pro se.* He must conduct enough investigation to draft pleadings that meet the requirements of the federal rules; he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request to proceed *in forma pauperis*, and file and serve his complaint. At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery.
>
> The practical difficulties facing an aggrieved person who invokes administrative remedies are strikingly different.

Burnett, 468 U.S. at 50-51, 104 S.Ct. at 2930 (emphasis added)

The Seventh Circuit's perception of 35 days as Constitutionally adequate to recognize the Constitutional dimensions of injury and to prepare and present claims of substance is in irreconcilable conflict with the policy of *Burnett.* The federal appeals court should have considered the actual experience of Paxton and its counsel, or at least the litigation resources reasonably available to persons similarly situated and their counsel, and reached a contrary result.

3. The Federal Court Of Appeals Has Rendered A Decision In Conflict With Those Of Other Federal Courts Of Appeals On The Same Matter

The decision of the federal court of appeals is in conflict with decisions of other federal courts of appeals on the same issue. The decisions of the other federal courts of appeals on the same matter include *Amico v. New Castle County*, 770 F.2d 1066 (3d Cir. 1985), *affirming* 101 F.R.D. 472, 479-80 (D. Del. 1984), *Pauk v. Board of Trustees*, 654

F.2d 856, 862 (2d Cir. 1981), and *Johnson v. Davis*, 582 F. 2d 1316, 1319 (4th Cir. 1978).[7]

In *Amico*, the Third Circuit Court of Appeals affirmed without comment a district court decision including reasoning that "[i]t would be absurd to grant the plaintiff a right to challenge a zoning ordinance . . . and then limit the right by requiring him to institute an action within 60 days. . . ." 101 F.R.D. at 480 n.8. In *Pauk*, the Second Circuit rejected a one year and 90 day limitation on Section 1983 actions. In *Johnson*, the Fourth Circuit rejected a one year state statute of limitations for federal civil rights claims as being "unreasonably discriminatory."

The effect of the decision of the Seventh Circuit was to limit persons in Illinois seeking redress of denial of rights in administrative proceedings to a period of 35 days within which to flawlessly institute administrative appeal, or permanently forfeit their federal Constitutional rights. *Amico*, *Johnson* and *Pauk* hold, to the contrary, that periods of 60 days, one year, and one year and 90 days, respectively, are not Constitutionally acceptable. The decision of the Court of Appeals is in direct conflict with *Amico*, *Pauk*, and *Johnson*.

4. The Decision Calls For An Exercise Of The Power Of Supervision Of The United States Supreme Court Because The Supreme Court of Illinois And Appellate Courts of Illinois, Addressing The Precise Issue Determined By The Seventh Circuit, Have Resolved The Issue to the Contrary

Included within the decision of the Court of Appeals is the conclusion that a 35 day period of state law is a claim preclusive period, as a matter of state law. The decision was made with reference to a dissent in a United States

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[7] The cases are applicable under authority of *Haring, supra.*

Supreme Court case from 1952,[8] a federal court of appeals decision on federal law[9], and the "pattern [of state cases] on which we have elaborated." *Slip op.* at 9-11, *infra* at 9a-11a.

The Seventh Circuit decision was a gross failure to follow state law. The very state court decision asserted as claim preclusive *begins* and *ends* its discussion with reference to *jurisdiction*:

> The City appeals.
>
> On appeal it contends, *inter alia*, that the circuit court lacked subject matter jurisdiction . . . .
>
> * * *
>
> In light of our conclusion that the circuit court lacked jurisdiction . . . , we need not consider the City's other contentions.

132 Ill. App. 3d at 571, 478 N.E.2d at 2. The District Court missed the first reference to jurisdiction and described the second reference as "simply careless usage." *Infra* at 29a. The Court of Appeals found the references to jurisdiction to be a "toy[ing] with that characterization." *Infra* at 8a.

The references were neither careless usage nor toying. The explicit language of the state court of appeals decision is consistent with clear Illinois Supreme Court precedent. *Fredman Brothers Furniture Co. v. Department of Revenue*, 109 Ill. 2d 202, 486 N.E.2d 893 (1985) stands clearly for the proposition that dismissals of the type asserted as claim preclusive by the federal appeals court, i.e., those dismissals made "when the litigant had an *opportunity* to receive an adjudication" are, instead, dismissals for lack of jurisdiction. No Illinois case holds to the contrary. No Illinois case holds such dismissals claim preclusive. The federal appeals court conceded as much:

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[8] *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 39, 73 S.Ct. 67, 70 (1952) (Frankfurter, J., dissenting).

[9] *Kimmel v. Texas Commerce Bank*, 817 F.2d 39 (7th Cir. 1987).

> The courts of Illinois have not articulated the difference between jurisdictional and other dismissals in the terms we have used.

Slip op. at 11, *infra* at 11a.

The Illinois appellate court decision in *O'Hare International Bank v. Zoning Board of Appeals*, 37 Ill. App. 3d 1037, 347 N.E.2d 440 (1st Dist. 1976), decides the very issue presented here. In *O'Hare*, the plaintiffs completely failed to file summonses for objectors who appeared at the administrative hearing in issue. The state appellate court initially dismissed plaintiffs' administrative review action because of this procedural flaw. *O'Hare International Bank v. Zoning Board of Appeals*, 8 Ill. App. 3d 764, 291 N.E.2d 349 (1st Dist. 1972). Plaintiffs refiled their action within a one year period provided by Illinois statute for dismissals not on the merits. The state trial court denied defendants' motion to dismiss the refiled complaint.

The appellate court upheld plaintiffs' right to refile:

> In repeating their contention that the second complaint should have been dismissed and that the trial court erred in not doing so, the defendants have interposed numerous arguments to the effect that the plaintiffs had no right to rebring their acton for administrative review and to name additional parties as defendants inasmuch as the statute of limitations had run. . . . Their arguments are without merit. The plaintiffs had the right to refile their action for administrative review within one year after our court reversed the judgment favoring them, and this they did 364 days after our decision.
>
> * * *
>
> No injustice resulted to the defendants who received notice and a hearing without being forced to undergo undue expense or inconvenience.

O'Hare International Bank v. Zoning Board of Appeals, 37 Ill. App. 3d at 1038, 347 N.E.2d at 441. Clearly, where a plaintiff who failed completely to comply with the proce-

dural requirements of the administrative review statute is permitted to refile the action within one year, no *res judicata* effect was found.[10] This same result should have been reached by the federal courts in the instant case.

The decision of the federal Court of Appeals was a decision not *of* state law, as required, but *in spite of* state law. It was made despite clear Illinois Supreme Court and appellate court precedent to the contrary. It was a failure to follow the accepted and usual course of judicial proceedings of sufficient magnitude to call for an exercise of the Supreme Court's power of supervision.

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[10] *See*, Ill.Rev.Stat., ch. 110A, ¶ 273:

> Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, *other than a dismissal for lack of jurisdiction*, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

(emphasis added). By negative implication, a dismissal for lack of jurisdiction does *not* operate as an adjudication on the merits.

CONCLUSION

In denying Paxton access to federal court, the Court of Appeals for the Seventh Circuit effectively held there to be a 35 day statute of limitations barring redress for denial of Constitutionally guaranteed rights, where the rights were denied in an administrative proceeding in Illinois. The Court of Appeals erred when it failed to follow the Supreme Court rulings in *Allen*, *Migra* and *Burnett*. The Court of Appeals compounded the error when it disregarded definitive decisions of the courts of Illinois as to Illinois law. A gross injustice has been done, and will be repeated frequently on the authority of the Court of Appeals decision.

Respectfully, the petition for Writ of Certiorari should be granted.

American National Bank & Trust Company
and Paxton Landfill Corporation

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APPENDIX

APPENDIX

Table of Contents

Opinion of the United States Court of Appeals for the Seventh Circuit. 1a

Opinion of the United States District Court for the Northern District of Illinois. 13a

Opinion of the Appellate Court of Illinois, First District (3rd Division). 35a

Order of the Circuit Court of Cook County. 39a

Statutes

United States Constitution, Amendment 5 . . . . . 40a

United States Constitution, Amendment 14 . . . . . 41a

Title 28, United States Code, Section 1738. . . . . 43a

Title 42, United States Code, Section 1983. . . . . 44a

Title 42, United States Code, Section 1988. . . . . 45a

Supreme Court Rule of Practice 17 . . . . . 46a

Illinois Revised Statutes, Chapter 110 Section 3-103 . . . . . 47a

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-2131

AMERICAN NATIONAL BANK & TRUST COMPANY,
as Trustee under Trust No. 33832,
and PAXTON LANDFILL CORPORATION,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO and ZONING BOARD OF APPEALS
FOR THE CITY OF CHICAGO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 1084—Milton I. Shadur, *Judge.*

ARGUED MAY 27, 1987—DECIDED JULY 13, 1987

Before CUMMINGS, WOOD, JR., and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* American National Bank, the trustee of a parcel of land in Chicago, applied for a zoning variance on behalf of Paxton Landfill Corp., the beneficial owner. The land has been zoned for "heavy manufacturing" since 1923 but has been a garbage dump for more than 50 years under a series of variances. Chicago's Zoning Board of Appeals has been using the zoning-and-variance device to establish a system of licensing for

landfills. Variances for this and neighboring parcels have been granted routinely.

The Bank encountered difficulty when it applied for a renewal in 1983. The City's Department of Planning opposed the application on the ground that the City owned rights of way through the parcel. The Bank pursued the application before the Board and also filed a suit in state court seeking to quiet title in the parcel. While the suit was pending, the City's Environmental Control Inspection Department reported to the Board that the "site is well run and conforms to the [City's] ordinance and the best technology of landfill practices."

The Board held a hearing on February 24, 1984, and denied the Bank's application for a variance. The Chairman of the Board stated that he voted to deny the application because he did not like the reputation of Paxton's corporate parent. Another member of the Board stated that although the Board lacked authority to control the height of landfills, the dump in question could reach 50 feet above grade and should be curtailed. The Board's formal order, mailed on March 8, relied on both grounds.

On March 22 the Bank amended its pending suit to add a challenge to the denial. The amendment maintained that the Board's decision was against the weight of the evidence and rested on unproven attacks on Paxton's parent. The City filed a motion to dismiss on April 10, pointing out that the Bank had not served all of the parties to the Board's proceedings. To obtain judicial review of an administrative decision in Illinois, the plaintiff must serve summonses on all defendants within 35 days. Ill. Rev. Stat. ch. 110 ¶3-103. Paragraph 3-107 requires the plaintiff to name all parties to the administrative proceeding as defendants. On April 11, the 34th day, the Bank furnished the clerk of the court with summonses for the Board and the City's Department of Consumer Services. (Under Illinois practice in administrative litigation, the clerk of court serves the summonses.) Not until April 17,

the 40th day, did the Bank give the clerk the summonses for the four private parties who had appeared before the Board to oppose the application.

The Circuit Court of Cook County granted summary judgment for the Bank, holding the Board's decision unsupported by probative evidence in light of the report of the City's environmental officials. The Appellate Court of Illinois reversed, *American National Bank & Trust Co. v. Chicago*, 132 Ill. App. 3d 570, 478 N.E.2d 1 (1st Dist. 1985), on the sole ground that the Bank had not given the clerk all necessary summonses within the time required.

Foiled in state court, Paxton and the Bank (collectively Paxton) filed this suit under 42 U.S.C. §1983, contending that the zoning classification and the failure to grant a variance violated both the Due Process Clause of the fourteenth amendment and the Takings Clause of the fifth amendment to the extent it has been applied to the states. See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 233-41 (1897). They were promptly foiled again. The district court held, 636 F. Supp. 374 (N.D. Ill. 1986), that the suit is barred by principles of claim preclusion (res judicata) applicable in Illinois, whose law controls the effect of the judgment in the state suit. See 28 U.S.C. §1738; *Migra v. Warren City School District*, 465 U.S. 75 (1984). The court concluded that the evidentiary and constitutional arguments are a single claim, so that the adverse disposition of one precludes subsequent litigation of the other. Although a dismissal for want of jurisdiction does not preclude later assertion of the same claim, the district court held that a dismissal for failure to tender the summonses is not "jurisdictional" under Illinois law.

Because the case was dismissed on the pleadings, we shall assume that Paxton and the Bank could establish that the Board acted without warrant. The effect of this is far from clear. It can't matter whether the City's system of licensing garbage dumps operates explicitly or through zoning variances. Either may be a taking yielding a right of compensation, *First English Evangelical Lutheran*

Church v. Los Angeles, 55 U.S.L.W. 4781 (U.S. June 9, 1987), but one aggrieved by such a decision must resort to state remedies. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985). If state remedies will prevent the injury, the state has not taken property or violated the fourteenth amendment. *Williamson* requires an owner to pursue state remedies, and presumably this means to pursue them using the procedures specified by the state. You can spurn your state remedies by filing late as well as by not filing at all. We know that in this case the remedies available in the courts of Illinois could have averted any injury to Paxton, and it is odd to contemplate a suit in which Paxton seeks to compel the City to compensate Paxton for loss that would not have occurred had it complied with ¶¶3-103 and 3-107. Cf. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 799 F.2d 317, 324-28 (7th Cir. 1986). Nonetheless, the district judge did not reach the merits, so we shall assume that there is something to this litigation and limit our decision to the preclusive effect of the judgment in the state case.

Paxton urges us to disregard the state judgment, despite §1738, on the ground that the 35-day rule is too short. See *Burnett v. Grattan*, 468 U.S. 42 (1984), and other cases holding that periods ranging from 90 days to a year are too short to be absorbed as federal statutes of limitations for §1983 cases. These cases say that victims of constitutional torts must have enough time to find lawyers and assemble their claims. Paxton believes that 35 days was not long enough to advance its constitutional claims. The district court held *Burnett* irrelevant because it dealt only with periods of limitations under 42 U.S.C. §1988 and therefore did not address the effect of §1738. 636 F. Supp. at 383-84. We agree with the district court's assessment. That Paxton would have had two years to start an independent federal suit does not affect the preclusive effect of Paxton's first suit. Paxton might as well argue that if it had fully litigated its constitutional claims in state court, it could start over in federal court so long

as there were still time remaining on the two-year statute of limitations now applicable to §1983 litigation in Illinois.

More, the observation that we cannot ordinarily expect victims of constitutional torts to sue within 35 days does not tell us much about the appropriate treatment of one who did file suit within that time. Paxton argues that 35 days is unconstitutional under the Due Process Clause. Yet due process requires only that a person have a meaningful opportunity to present his claims; it does not guarantee success. Compare *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), with *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). Paxton was not ignorant of its rights or in need of more time to investigate. It had counsel throughout and commenced litigation even before the Board decided. A firm with counsel can move fast. Complex cases about tender offers are begun, slugged out, and decided on appeal in less than 35 days. Paxton's problem was that counsel did not appreciate the effect of ¶¶3-103 and 3-107 even after receiving the City's motion with two days left. The Due Process Clause does not ensure against oversights in litigation.

The 35 days under §3-103 is more like the time within which to take an appeal than to file a suit. Before the 35 days commenced, Paxton was litigating in both court (the quiet title suit) and agency. The administrative tribunal rendered its decision, and Paxton had more than a month to move that portion of the dispute to court. During the administrative proceeding Paxton had plenty of time to plan its strategy, locate arguments, think of contingencies, even draw up complaints and summonses. (Complaints are filed to challenge some federal administrative decisions within seconds of their announcement.) The Board announced its decision orally two weeks before it entered a formal order; those two weeks offered additional time for selecting issues. If the Board's hearing had occurred before an administrative law judge, with an appeal to the Board, Paxton could not argue that 35 days are too few to file the necessary papers in the Board, including a specification of issues to be pursued. Litigants

often file and serve within 35 days their petitions for certiorari or jurisdictional statements in the Supreme Court, documents much more complex than the skeletal complaint and summons Paxton had to file. So Paxton's contention that 35 days is unconstitutionally brief, relieving it of the preclusive effect of the state judgment, is unavailing.

We therefore inquire whether the courts of Illinois would allow Paxton to initiate a suit challenging the Board's decision on constitutional grounds, after failing to secure statutory review of the administrative decision. The initial inquiry is whether the claims—insufficient evidence and constitutional deprivation—are the "same". To that the answer is yes. Constitutional and administrative contentions are different ways of obtaining the same relief: nullification of the decision. (Paxton now wants money too, but the only reason for the monetary claim is Paxton's failure in state court. Success in the state suit would have enabled Paxton to use the dump uninterrupted. Defeat in litigation is not itself a justification for a new case on the theory that the loss created a new claim for relief.) Paxton could have raised both statutory and constitutional arguments before the Board and the circuit court. Both arguments arise out of the same event, the Board's denial of a variance. *Williamson* shows the fundamental identity of the constitutional claim and other methods of challenging a zoning decision under state law.

The analysis in the last paragraph would be straightforward if the question were solely one of federal law, for federal courts use the "nucleus of operative facts" approach. E.g., *In re Energy Cooperative, Inc.*, 814 F.2d 1226, 1230-33 (7th Cir. 1987); *Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 645 (7th Cir. 1986); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). The appellate courts of Illinois are divided, with some following that view and others stating that claims are the same only when identical evidence would support them. Paxton invokes the latter line of cases to argue that it may relitigate. We have reconciled these divergent cases by holding that evidentiary and constitutional argu-

ments are the same as a matter of the Illinois law of preclusion. E.g., *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987); *Frier v. Vandalia*, 770 F.2d 699 (7th Cir. 1985); *Hagee v. Evanston*, 729 F.2d 510, 513-14 (7th Cir. 1984). This reconciliation is provisional, for Illinois has the last word about the preclusive effect of its judgments. Until told otherwise by Illinois, we shall continue to hold that constitutional, statutory, and evidentiary challenges to an administrative decision are different arguments in support of a single claim for relief.

Perhaps one could say that the very existence of a 35-day deadline for challenging administrative decisions, a deadline inapplicable to other sorts of contentions, shows that there is more than one claim. Paxton does not make that argument, however, and in another case of administrative action followed by a §1983 suit the Supreme Court applied principles of preclusion. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). So far as we can tell, Illinois does not make the definition of a "claim for relief" depend on the rules governing timely filing. If two lines of argument have different periods of limitation, someone who files within the shorter period and raises only the arguments governed by the shorter period may not file a second suit, governed by the longer period, after he loses the first—even if he loses the first solely on the ground that the filing was untimely. *Smith v. Chicago*, No. 86-1744 (7th Cir. June 10, 1987), slip op. 5; Charles Alan Wright, Arthur Miller & Edward Cooper, 18 *Federal Practice and Procedure* §4441 (1981). Paxton relies on *O'Hare International Bank v. Zoning Board of Appeals*, 37 Ill. App. 3d 1037, 347 N.E.2d 440 (1st Dist. 1976), for the contrary proposition. The initial suit in *O'Hare* was dismissed, as Paxton's was, for failure timely to serve people who appeared before the Zoning Board in opposition to an application. The plaintiff then refiled the case, naming the proper defendants. The court held this proper, relying on Ill. Rev. Stat. ch. 83 ¶24a for the rule that anyone may refile a case within a year of the reversal of a favorable judgment. The court did not discuss ¶3-103

or principles of preclusion; it was concerned only with an argument that "the statute of limitations had run" (37 Ill. App. 3d at 1038, 347 N.E.2d at 441) on the new suit. It is hard to see how Illinois could allow refiling within a year despite holding that ¶3-103 is unyielding. *Fredman Brothers Furniture Co. v. Department of Revenue*, 109 Ill. 2d 202, 486 N.E.2d 893 (1985). *O'Hare* therefore does not offer us the answer to a case involving the problems it omitted.

Paxton finally takes a completely different tack, arguing that ¶3-103 is so rigid that it is "jurisdictional". A dismissal for want of jurisdiction does not preclude a subsequent suit in a court with jurisdiction. *People ex rel. Scott v. Chicago Park District*, 66 Ill. 2d 65, 69, 360 N.E.2d 773, 775-76 (1976); Ill. Sup. Ct. Rule 273. The appellate court toyed with that characterization in the Bank's suit. Its principal discussion states:

> The 35-day period for issuance of summons is mandatory and not jurisdictional and failure to secure issuance of summons within the period will not preclude judicial review. However, the 35-day period is intended to insure that the plaintiff cannot unduly delay review, and the plaintiff must show a good faith effort to have the clerk issue the summons within the 35 days to warrant relaxation of the filing period.

132 Ill. App. 3d at 573, 478 N.E.2d at 2-3 (citations omitted). Yet the court ended by stating: "In light of our conclusion that the circuit court lacked jurisdiction to review the resolution of the Zoning Board, we need not consider the City's other contentions." 132 Ill. App. 3d at 574, 478 N.E.2d at 3. The district court concluded that the appellate court meant the first rather than the second characterization. 636 F. Supp. at 381-83. Paxton complains that the district court did not discuss *Fredman Brothers*, which the Supreme Court of Illinois decided after the appellate court's decision in Paxton's case. *Fredman Brothers*, in conjunction with *Cox v. Board of Fire & Police Commissioners*, 96 Ill. 2d 399, 451 N.E.2d 842 (1983); and *City*

National Bank & Trust Co. v. Property Tax Appeal Board, 97 Ill. 2d 378, 454 N.E.2d 652 (1983), drew a line between the plaintiff's duty timely to file the action for administrative review, which it called "jurisdictional", and the clerk's duty to serve the summonses, which it called "mandatory". The plaintiff's obligation to furnish the clerk with the summonses must be somewhere in between. The parties vigorously debate just what to make of *Fredman Brothers* and the contradictory language in the appellate court's opinion.

We do not think the precise characterization matters, however, because "jurisdiction" is "a verbal coat of too many colors." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting). We need to know what "jurisdiction" means for purposes of preclusion. When a court says it lacks jurisdiction it may mean that the plaintiff came to the wrong court, that he came too early, that he came too late, that he is the wrong party to present the issue, that the legislature did not authorize the court to decide the case (subject matter jurisdiction), that no court may decide the issue (the case or controversy requirement for federal litigation), that the legislature forbade the use of a particular remedy (e.g., the Norris-LaGuardia Act, 29 U.S.C. §§101-15, which uses the language of jurisdiction to restrict injunctions), that the defendant has not been haled before the court properly (personal jurisdiction), that the rule adverse to the plaintiff admits of no exceptions (i.e., the court is powerless to relax a jurisdictional rule, such as the time limit for taking an appeal, although it may relax a statute of limitations), that the court must raise the issue even if no party requested a decision (i.e., the sort of rule that may not be waived), that the defendant is immune from suit, that the case is over (a court lacks jurisdiction to reopen its judgments except on a timely motion), or that the case has moved to another court (a trial court lacks jurisdiction to continue hearing the case once the losing party has filed an effective notice of appeal). And there may be more meanings. Cf. *Szabo Food Service, Inc. v.*

Canteen Corp., No. 86-3093 (7th Cir. June 29, 1987), slip op. 6-9. *Fredman Brothers* used "jurisdiction" to mean that the court may not excuse noncompliance. If the plaintiff does not file the case within 35 days, nothing anyone can do will save it. We must decide whether failing to tender the summonses within 35 days, another fatal gaffe, is the kind of event that permits the plaintiff to file a second suit.

In the law of preclusion, "jurisdiction" is interchangeable with "not on the merits". A decision "on the merits" bars further litigation; a decision "not on the merits" does not. "Dismissed for want of jurisdiction" is the common conclusion of an opinion that has not reached the merits. See Fed. R. Civ. P. 41(b); Ill. Sup. Ct. Rule 273; *Restatement of Judgments* §49 (1942); *Restatement (Second) of Judgments* §20(a) and comment c (1982). So if the court says "you have come to the wrong court, try another" or "this suit is premature, wait until the case is ripe" it will use the language of jurisdiction. Such adjudications, not "on the merits", may be followed by litigation in the right court or at the right time. But if the court says "you are too late" or otherwise wraps up the case in a way that indicates that the plaintiff has irrevocably failed, the use of jurisdictional language does not mean that the plaintiff may try again. A decision may be "on the merits" for purposes of preclusion even though the court did not resolve the merits. A dismissal for want of prosecution has this effect, see *Kimmel v. Texas Commerce Bank*, 817 F.2d 39 (7th Cir. 1987), as does a dismissal for laches. *Smith v. Chicago*, *supra*. The decision is on the merits (and hence not jurisdictional) for purposes of preclusion when the litigant had an *opportunity* to receive an adjudication from that court. That he bollixed his opportunity by starting the suit too late or failing to prosecute it properly does not justify exposing the defendant to another round. This is also the fundamental justification for claim preclusion (merger and bar), which wipes out an opportunity to raise an issue that the plaintiff did not even plead in the first case, as Paxton neglected to plead its constitutional arguments in state court.

When the first suit is dismissed under a statute of limitations, that is the end. Paxton concedes as much. A dismissal under the statute of limitations means: "You came too late, and you did not offer a sufficient reason to excuse the delay." The Bank's suit (on Paxton's behalf) in state court was dismissed because of a time limit. All it means to say that the 35-day rule is jurisdictional is: "You came too late, and no matter the reason we may not excuse the delay." The different nomenclature does not obscure the functional identity. In each case the plaintiff loses because it acted too late and did not have an adequate excuse. In each case the disposition is meant to be conclusive. It does not invite refiling at another time or in another court. That in one of the cases no excuse *could* have sufficed hardly justifies a second round of litigation; any distinction should run in the other direction.

The courts of Illinois have not articulated the difference between jurisdictional and other dismissals in the terms we have used, but the state's cases establish the pattern on which we have elaborated. Illinois treats the following kinds of decisions as "on the merits" for purposes of preclusion: failure to comply with a special (claim-specific) period of limitations, *Muscare v. Voltz*, 107 Ill. App. 3d 841, 843, 438 N.E.2d 620, 622 (1st Dist. 1982); failure to comply with discovery and other pretrial orders, *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113, 122, 382 N.E.2d 1217, 1221 (1978); failure to amend the complaint in a timely fashion, *Brainerd v. First Lake County Nat'l Bank*, 1 Ill. App. 3d 780, 275 N.E.2d 468 (2d Dist. 1971). It treats these decisions as not on the merits: filing in the wrong court, *Saint Boniface Roman Catholic Church v. Wolf*, 302 Ill. 204, 134 N.E. 1 (1922), *Style Builders, Inc. v. Fuernstahl*, 32 Ill. App. 3d 272, 276, 336 N.E.2d 369, 372 (1st Dist. 1975); filing too soon, *Pratt v. Baker*, 79 Ill. App. 2d 479, 482, 223 N.E.2d 865, 867 (2d Dist. 1967) (dictum); filing in a court without subject-matter jurisdiction, *Patzner v. Baise*, 144 Ill. App. 3d 42, 44, 494 N.E.2d 178, 179-80 (2d Dist. 1986); taking a premature appeal, *Weiland Tool & Mfg. Co. v. Whitney*, 44 Ill. 2d 105, 113-14, 251

N.E.2d 242, 247 (1969); seeking an unavailable remedy, *Foreman v. Martin*, 26 Ill. App. 3d 1028, 1030, 325 N.E.2d 378, 379-80 (2d Dist. 1975). The distinction between "come back later" or "go someplace else", on the one hand, and "you're too late", on the other, is part of the fabric of Illinois law. Paxton lost because it furnished the summonses too late. A court of Illinois therefore would hold the judgment preclusive in future litigation, and we must do likewise.

AFFIRMED

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

AMERICAN NATIONAL BANK & TRUST COMPANY, etc., et al.,

Plaintiffs,

v.

CITY OF CHICAGO, et al.,

Defendants.

No. 86 C 1084.
June 5, 1986.

COUNSEL:

George P. McAndrews, Robert C. Ryan, Allegretti, Newitt, Witcoff & McAndrews, Ltd., Anne C. Tighe, Cotsirilos & Crowley, Ltd., Chicago, Ill., for plaintiffs.

Judson H. Miner, Acting Corporation Counsel, Ira M. Kleinmuntz, Assistant Corporation Counsel, Chicago, Ill., for defendants.

MEMORANDUM OPINION AND ORDER

In an eight-count amended complaint (the "Complaint"), Paxton Landfill Corporation ("Paxton") as owner of the beneficial interest in, and American National Bank & Trust Company ("Bank") as trustee under, an Illinois land trust have sued the City of Chicago ("City") and its Zoning Board of Appeals ("Board") under 42 U.S.C. § 1983 ("Section 1983") and (invoking pendent-jurisdiction doctrine) various provisions of the Illinois Constitution. Counts I through IV charge defendants' refusal to grant plaintiffs a zoning variance on the real estate held in the land trust (the "Property"):

1. denied plaintiffs equal protection in violation of the Fourteenth Amendment (Count I);

2. denied plaintiffs "substantive" due process in

violation of the Fifth[1] and Fourteenth Amendments (Count II);

3. involved a "taking" of the Property without just compensation inviolation of the Fifth[2] and Fourteenth Amendments (Count III) and Ill. Const. art. I, Section 15 (Count IV).

Counts V through VII are directed only against City. Plaintiffs claim the Property's current M3-3 (heavy manufacturing) zoning:

1. denies them substantive due process under the federal Constitution (Count V) and Ill. Const. art. I, § 2 (Count VII); and

2. takes the Property without just compensation in violation of the federal and state constitutional provisions mentioned earlier (Counts VI and VIII).

City and Board have now moved under Fed.R.Civ.P. ("Rule") 12(b)(6) to dismiss this action on two independent grounds:

1. It is barred by res judicata principles.

2. No cognizable equal protection, due process or just compensation claims are stated.

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[1] With no federal actor in the picture here, the Fifth Amendment's Due Process Clause is inapplicable ex proprio vigore to defendants' actions. Plaintiffs can assert only the Fourteenth Amendment's guaranty of due process.

[2] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 101 S.Ct. 446, 450, 66 L.Ed.2d 358 (1980) restates the nonagenarian principle that the Fourteenth Amendment's Due Process Clause incorporates the Fifth Amendment's Just Compensation Clause, making it applicable to state actors. Precise jurisprudence thus calls for labeling plaintiff's just compensation claim in Fourteenth Amendment terms (see n.1). Nonetheless this opinion will follow the conventional (though technically inaccurate) practice of citing to the underlying Bill of Rights provision.

For the reasons stated in this memorandum opinion and order, defendants' motion is granted and this action is dismissed on the first of those grounds.

Facts[3]

Since 1977 Paxton has operated a sanitary landfill on the Property (¶ 2). It was not the first to do so, for waste has been stored on the Property for at least 50 years (¶ 7). Though the Property was zoned M3-3 (heavy manufacturing district) as early as 1923 (¶ 6), since 1962 it has been used exclusively as a landfill under zoning variances issued by City and Board (¶ 8).

Board has also routinely issued variances permitting landfill use of M3-3 zoned land adjacent to or near the Property (¶ 12). In October 1982 Board granted Land and Lakes Company ("Land and Lakes") a variance allowing such use of its M3-3 zoned land immediately bordering the Property (¶ 13), finding (Ex. A at 2, 4):

> 5. That the subject [Land and Lakes] site in its present condition is not capable of development for a permitted use in its applied zoning classification of M3-3 Heavy Manufacturing;
>
> * * *
>
> 10. That the proposed use will not cause substantial injury to the value of other property in the neighborhood in which it is to be located as the developed portion of said area is identified as a high intensity heavy manufacturing district and the dominant land use in the nearby area is as sanitary landfill operations.

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[3] Rule 12(b)(6) principles require this Court to accept as true the Complaint's well-pleaded factual allegations, drawing all reasonable inferences in plaintiffs' favor. *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985). All citations to the Complaint will simply take the form "¶ –" or "Ex. –."

Paxton says the Property has similarly become unsuited for any reasonable use other than as a landfill (¶¶ 9, 10).

In June 1983 Paxton applied for a zoning variance to permit continued operation of the Property as a landfill (¶ 15).[4] Although the chief environmental control inspector of City's Department of Consumer Services submitted a report approving Paxton's landfill management techniques (Ex. B), Board denied Paxton's application February 24, 1984 (Ex. C). Board Chairman Jack Guthman ("Guthman") said he doubted Paxton had shown "the proper regard for the environment" (¶ 18). Board Member George Cullen ("Cullen") added his concern that a landfill rising 50 feet high might well be "deleterious to the people in that area" (¶ 19). Cullen also agreed with Guthman that "[Paxton's] background is a factor here as well" (*id.*). Board's resolution denying Paxton's application (the "Resolution") reflected those concerns (Ex. C at 1-2):

> WHEREAS, the Zoning Board of Appeals, having fully heard the testimony and arguments of the parties and being fully advised in the premises, finds in this case . . . that the proposed landfill, when completed, will reach a height of 50 feet above grade and therefore will be unsuitable for future manufacturing uses; that the applicant and its related entities has a history with respect to the conduct and operation of landfills which has indicated disregard for environmental concerns; that the applicant and its related entities have shown such disregard for environmental laws and regulations in this and other jurisdictions that there can be no assurance that the

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[4] Board had originally granted a three-year special-use variance on the Property in 1975. That was successively extended to November 30, 1983 (Ex. C at 1). Special-use variances are now valid for no longer than 12 months (Chicago Municipal Code ("Code") ch. 194A, § 11.10-5).

public health, safety and welfare will be protected at this site; it is therefore

RESOLVED, that the application for a special use be and it hereby is denied.

While Paxton's application was pending before Board, City's Department of Planning claimed public rights of way on the Property. Bank brought a declaratory quiet-title action against City in the Circuit Court of Cook County (the "Circuit Court Action")[5] On March 22, 1984 Bank added an administrative review count to the Circuit Court Action under the Illinois Administrative Review Act ("ARA," Ill.Rev.Stat. ch. 110, ¶¶ 3-101 to 3-112),[6] claiming the Resolution (1) was against the manifest weight of the evidence and (2) was based solely on hearsay allegations as to Paxton's poor environmental record (¶ 21).[7] After City filed a motion to dismiss for failure to join necessary parties, Bank amended its complaint, adding Board and several others as defendants (Opinion, 132 Ill.App.3d at 571, 478 N.E.2d at 2).

Bank's Circuit Court Action was a success. Its title to the Property was confirmed, and the Resolution was reversed (Ex. D at 12).[8] Judge Murray held Board's findings

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[5] *American National Bank & Trust Co. v. City of Chicago*, 132 Ill.App.3d 570, 570-71, 478 N.E.2d 1, 2 (1st Dist. 1985) (the "Opinion"), defendants' successful appeal from Bank's victory in the Circuit Court Action, recounts its history.

[6] Further citations to ARA will take the form "ARA ¶ – ," referring to the Chapter 110 paragraphing rather than ARA's internal numbering.

[7] Bank also added a mandamus count, seeking to compel City's Department of Consumer Services to issue a landfill operation permit (Opinion, 132 Ill.App.3d at 571, 87 Ill.Dec at 863, 478 N.E.2d at 2).

[8] Judge Murray denied the mandamus claim (see n. 7), saying such action was premature (Ex. D at 8).

as to Paxton's poor environmental record were "not supported by any competent evidence" (*id.* at 10), and he remanded the matter to Board with a direction to issue the variance if Paxton "otherwise compl[ied] with the rules and regulations" (*id.* at 12).

City appealed only as to the administrative review count,[9] and the Appellate Court reversed. Without reaching the substance of Judge Murray's sufficiency-of-evidence ruling, the Opinion (132 Ill.App.3d at 573, 87 Ill.Dec. at 865, 478 N.E.2d at 3) held Bank's failure to comply with the issuance-of-process requirements of ARA ¶ 3-103[10] required dismissal.

Both in posing and in resolving that issue, the Appellate Court characterized the dismissal in wholly nonjurisdictional terms (132 Ill.App.3d at 572, 478 N.E.2d at 2-3) (citations omitted):

> The 35-day period for issuance of summons is mandatory and not jurisdictional and failure to secure issuance of summons within the period will

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[9] On April 11, 1986 (just after receiving defendants' opening memorandum) this Court directed the parties to clarify the posture of the rest of the Circuit Court Action. Plaintiffs' Mem. 7 n. 4 now says City did not appeal the Circuit Court's quiet-title ruling. Thus the Circuit Court Action has ripened into a final judgment in all respects.

[10] ARA ¶ 3-103 provides:

> Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby.

Bank failed to procure timely issuance of summons to four community residents who had been parties to the Board proceeding (Opinion, 132 Ill.App.3d at 571, 478 N.E.2d at 3).

> not preclude judicial review.... However, the 35-day period is intended to insure that the plaintiff cannot unduly delay review... and the plaintiff must show a good faith effort to have the clerk issue the summons within the 35 days to warrant relaxation of the filing period....
>
> * * *
>
> We conclude that the Bank was not diligent in obtaining issuance of the summonses and that the Circuit Court erred in denying the City's motion to dismiss.

But having framed and decided the issue in that way, the Opinion immediately went on to say (*id.*):

> In light of our conclusion that the Circuit Court lacked jurisdiction to review the resolution of the Zoning Board, we need not consider the City's other contentions.

Bank sought and was denied leave to appeal that decision to the Illinois Supreme Court (¶ 28).

Res Judicata Analysis

City and Board principally contend this entire action is barred by res judicata principles. As this Court recently explained in *Magnus Electronics, Inc. v. Argentine Republic*, 637 F.Supp. 487, 489-90, No. 85 C 10557, slip op. at 6-7 (N.D.Ill. May 7, 1986):

> Res judicata principles encompass both "claim preclusion," which prohibits litigants from splitting a single cause of action into more than one proceeding, and "issue preclusion," which forbids litigants from relitigating issues actually resolved in an earlier proceeding. *Migra v. Warren City School District, Board of Education*, 465 U.S. 75, 77 n. 1 (1984) thoroughly explains that terminology. Claim preclusion applies to bar theories that were or that could have been raised in the prior case, *Nevada v. United States*, 463 U.S. 110, 129-30 (1983):
>
> > Simply put, the doctrine of res judicata provides that when a final judgment has

> been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

None of the constitutional issues plaintiffs press on this Court was actually resolved or even litigated before Board or in the Circuit Court Action and its appeal. City and Board must therefore seek claim-preclusion protection, as *Migra*, 465 U.S. at 77 n. 1 describes it:

> Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.

Trying to determine what "should have been advanced" but wasn't is an often metaphysical enterprise. That is especially so here, where the earlier suit was in state court. This Court must consider not only the judicial-economy and fairness-to-litigants rationales supporting res judicata, but also the comity concept expressed in the full-faith-and-credit statute, 28 U.S.C. § 1738 ("Section 1738"). *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980). On that score *Migra*, 465 U.S. at 85 (adapted to the facts here) states the controlling principle:

> Section 1983, however, does not override state preclusion law and guarantee [plaintiffs] a right to proceed to judgment in state court on [their] state claims and then turn to federal court for adjudication of [their] federal claims. We hold,

> therefore, that [plaintiffs'] state-court judgment in this litigation has the same preclusive effect in federal court that the judgment would have in the [Illinois] state courts.

Hence the initial inquiry here is whether Illinois courts would apply claim preclusion to plaintiffs' current lawsuit.

Illinois' claim-preclusion rule exhibits no unique characteristics (*Housing Authority for LaSalle County v. Young Men's Christian Association of Ottawa*, 101 Ill.2d 246, 251-52, 461 N.E.2d 959, 961-62 (1984)):

> The doctrine of *res judicata* provides that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the *same* claim, demand or cause of action." (Emphasis added.) (*People v. Kidd* (1947), 398 Ill. 405, 408, 75 N.E.2d 851 [, 853].) When *res judicata* is established "as a bar against the prosecution of a second action between the same parties upon the same claim or demand * * * it is conclusive not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other matter which might have been offered for that purpose. [Citations.]" *Barry v. Commonwealth Edison Co.* (1940), 374 Ill. 473, 478, 29 N.E.2d 1014 [, 1017].

Under that doctrine, claim preclusion requires three elements:

1. a final judgment on the merits;
2. identity of parties or their privies; and
3. identity of "claim, demand or cause of action."

Neither side disputes the presence of the second factor: City and Bank were original parties to the Circuit Court Action, with Board added later, and Paxton (beneficiary of the land trust of which Bank is trustee) is unquestionably

Bank's privy. But the parties battle over the other two elements, and the nature of their fight has tended to merge the two into one. Bank and Paxton say they could not have presented their constitutional claims to Board, and the later dismissal of the Circuit Court Action "for lack of jurisdiction" negates any final decision on the merits by a judicial forum (which could have heard those claims). In *Housing Authority* language, they contend there was no identity of "claim, demand or cause of action" between the Board proceeding and the claimed nullity of the Circuit Court Action.

That line of argument is correct up to a point, but it fails as a whole. Pulling its merged elements apart helps to show why. First, although neither side has really addressed the scope of Board's jurisdiction, there is little doubt *Board* could not have heard plaintiffs' constitutional claims. Code ch. 194A, § 11.10-4 sets out the standards Board is to apply in considering special-use variances:

> No special use shall be granted by the Zoning Board of Appeals unless the special use:
>
> (1) a. Is necessary for the public convenience at that location;
>
> b. Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and
>
> (2) Will not cause substantial injury to the value of other property in the neighborhood in which it is to be located; and
>
> (3) It is within the provisions of "Special Uses" as set forth in rectangular boxes appearing in Articles 7, 8, 9, and 10; and
>
> (4) Such special use shall conform to the applicable regulations of the district in which it is to be located.

Those criteria are framed as factual inquiries, without provision for considering constitutional claims. Nothing there suggests Paxton could have urged Board to grant a

special-use permit because the opposite result would implicate a denial of due process or equal protection or a taking without just compensation. Nor does this Court's canvass of Code's other zoning provisions (ch. 194A) reveal Board has the power to establish zoning classifications, so Paxton could not have argued the substance of Counts V through VIII before Board either. In the terms articulated by *Housing Authority*, 101 Ill.2d at 252, 461 N.E.2d at 962, plaintiffs' constitutional claims are not the sort that "might have been offered" on Paxton's behalf at the *Board* stage. See also *Spiller v. Continental Tube Co.*, 95 Ill.2d 423, 432, 447 N.E.2d 834, 838 (1983) (claim preclusion extends to claims that "could have been raised"). Consequently it appears Board's Resolution would not have barred an Illinois court, in a later lawsuit, from determining the Paxton-Bank constitutional claims.

But Board's Resolution was not the end of things. Bank souqht administrative review, and "that has made all the difference."[11] For while Paxton's presentation to *Board* was necessarily limited to the factual issues of public necessity, convenience and welfare, Illinois law unquestionably gives parties the right to attack the constitutionality of administrative action and of ordinances in the judicial administrative-review process (*Howard v. Lawton*, 22 Ill.2d 331, 333, 175 N.E.2d 556, 557 (1961) (zoning ordinance); *Rockford Drop Forge Co. v. Pollution Control Board*, 71 Ill.App.3d 295, 297, 389 N.E.2d 212, 214-15 (2d Dist.1979) (pollution control regulations); *Head-On Collision Line, Inc. v. Kirk*, 36 Ill.App.3d 263, 268, 343 N.E.2d 534, 538 (1st Dist.1976) (tax assessment)). Further, a plaintiff in an administrative review lawsuit may always seek reversal on the ground the administrative action was arbitrary (*Secretary of State v. Kunz*, 116 Ill.App.3d 736, 739, 452 N.E.2d 387, 390 (4th Dist.1983), and that is the

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[11] R. Frost, *The Road Not Taken.*

gravamen of the Count II substantive-due-process claim in this case.

Moreover, even had all those constitutional onslaughts been unavailable in the ARA claim itself, such attacks could readily have been coupled with the ARA cause of action as added counts in the Circuit Court Action. Under Ill. Const. art. VI, § 9 the circuit courts "have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction. . . ." And the Code of Civil Procedure (Ill. Rev. Stat. ch. 110, ¶¶ 2-613 and 2-614) places no limit on joinder of counts and causes of action. Just as mandamus and declaratory counts were joined with the administrative-review count in the Circuit Court Action, so might Bank have added counts reflecting the state and federal constitutional claims. See *Skilling v. Skilling*, 104 Ill.App.3d 213, 219, 432 N.E.2d 881, 886 (1st Dist.1982) (circuit courts have "the general power to determine all matters of controversy arising . . . by reason of statute or the Constitution. . . .").

Clearly, then, the claims plaintiffs now advance could have been raised in the Circuit Court Action, and that of course was the natural time to do so (*Howard*, 22 Ill.2d at 333, 175 N.E.2d at 557):

> To hold otherwise would result in piecemeal litigation by first requiring review of an administrative body's decision and then entertaining another action to test constitutionality brought on by such decision.

Claim splitting is the vice against which claim-preclusion doctrine is aimed (*Restatement (Second) of Judgments* ("Restatement") § 24 (1980)). All the legal theories plaintiffs raise in this action could have been asserted in the Circuit Court Action to attack the Resolution's legitimacy, but Bank chose to mobilize only part of its arsenal (the manifest-weight-of-the-evidence and use of hearsay arguments) at that time.

Neither side has really discussed whether that would amount to "claim splitting" under Illinois law. *Housing Authority*, 101 Ill.2d at 251, 461 N.E.2d at 962 says res judicata bars a second action involving the same "claim, demand or cause of action," but the opinion is silent as to whether the three operative terms are coextensive, disjunctive or overlapping. Anyone reading a number of Illinois res judicata cases must come away with the impression those words (though they may have the sound of terms of art) have no fixed definition. That is unsurprising, given the near-infinite degrees of potential intersection between any first and second lawsuits examined in claim-preclusion terms. In any event, Illinois law has developed in a nonuniform manner (*Pfeiffer v. William Wrigley Jr. Co.*, 139 Ill.App.3d 320, 323, 484 N.E.2d 1187, 1189-90 (1st Dist. 1985) (citations omitted)):

> When determining the identity of causes of action for *res judicata* purposes, one line of Illinois cases considers whether the evidence needed to sustain the second suit would have sustained the first, or whether there is identity of facts essential to the maintenance of both cases. . . . Another line of Illinois cases has adopted a "transactional" approach in determining whether two suits involve the same cause of action, stating that "the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief."

In the face of that dichotomy, our Court of Appeals has synthesized the Illinois approach this way (*Hagee v. City of Evanston*, 729 F.2d 510, 514 (7th Cir.1984) (footnotes and citations omitted)):

> The principle that res judicata extends to all matters within the purview of the original action, whether or not they were actually raised, is tantamount to a rule requiring parties to consolidate all closely related matters into one suit. As such, the principle serves well the interest of judicial

> economy, and thus it is at the core of the res judicata doctrine. Two corollaries are also of fundamental importance to Illinois' res judicata doctrine. First is the rule that a party may not maintain two suits based on the same set of facts by the simple expediency of limiting the theories of recovery advanced in the first. . . . The second rule is that a party may not maintain two suits based on the same set of facts simply by altering the claim for relief from one suit to the next.

In this action plaintiffs have expressly disavowed any claim based on state procedural inadequacies (see their Mem. 21). What they wanted from the start was a zoning classification that would allow them to operate a landfill on the Property. Their Circuit Court Action said Board should have given them the right to do so. Board's failure to grant the special-use variance was the product of (1) the Code's terms and (2) Board's view of the evidence presented to it. Any claim that Board's decision was against the manifest weight of the evidence challenged precisely "the same conduct" as a claim Board's decision and City's code classification system were unconstitutional (see *Kenny v. Interim General Superintendent of Schools*, 112 Ill.App.3d 342, 348-49, 445 N.E.2d 356, 361 (1st Dist.1983)) and arose from the same "transaction" or "group of operative facts." Clearly the claims are "closely related" in *Hagee* terms.

Nor is the fact Bank and Paxton now ask for damages – a remedy not sought in the Circuit Court Action – significant. Restatement § 25, comment f states the general rule:

> *Successive actions for different remedies.* As the result of a single transaction or a connected series of transactions giving rise to a unitary claim, the plaintiff may be entitled to a number of alternative or cumulative remedies or forms of relief against the defendant. In a modern system of procedure it is ordinarily open to the plaintiff to pursue in one action all the possible remedies whether or not consistent, whether alternative or

> cumulative, and whether of the types historically called legal or equitable.
>
> Therefore it is fair to hold that after judgment for or against the plaintiff, the claim is ordinarily exhausted so that the plaintiff is precluded from seeking any other remedies deriving from the same grouping of facts.

Of course Bank could not effectively have sought damages in conjunction with a constitutional attack in the Circuit Court Action: By definition a decision upholding the Resolution's constitutionality would have negated any entitlement to damages, while if the Resolution had been invalidated Bank would have received the desired zoning relief – and thus (again by definition) could have sustained no damages. But that only underscores the irrelevancy of a damage claim – one really self-created in this case. It should be remembered Section 1983 creates no legal rights: It merely provides a procedural vehicle for the enforcement of federal constitutional and statutory claims (*Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-18, (1979)). Nothing about Section 1983 alters the nature of the underlying constitutional claims Bank could and should have asserted in the Circuit Court Action. Thus the "claim, demand or cause of action" here is the same as that in the earlier case.

That leaves only one factor in the *Housing Authority* trio to be examined: a final judgment on the merits in the prior action. Because the Board proceeding could not create a bar to claims not cognizable before it, again the point of reference must be the Circuit Court Action. And plaintiffs contend the dismissal there, said at one point to be for "lack[of] jurisdiction" (Opinion, 132 Ill.App.3d at 573, 478 N.E.2d at 3), means there was no final judgment *on the merits*. But it is well settled a court cannot determine the res judicata effect of its own judgments. *People v. Kidd*, 398 Ill. 405, 410, 75 N.E.2d 851, 854 (1947) (citations omitted) teaches:

> The doctrine of res judicata is not dependent upon the correctness of the judgment, or of the verdict or finding on which it is based. . . . Nor is the value of a plea of former adjudication to be determined by the reasons which the court rendering the former judgment may have had for doing so. . . . The effect of the former judgment as a bar is the same whether resting on an erroneous view of the law or not.

Thus it is not what the Opinion said it did that counts. Instead, this Court must determine what the Appellate Court did in fact.

Dismissals for lack of jurisdiction do not generally raise a claim-preclusive bar (*People ex rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 69, 360 N.E.2d 773, 775 (1977); Restatement § 20(1)(a)). City and Board say that rule does not apply here, because even though the Opinion said the dismissal was for lack of jurisdiction, its earlier characterization of ARA ¶ 3-103 as "mandatory and not jurisdictional" (132 Ill.App.3d at 572, legal rule: ARA ¶ 3-103's 35-day summons period is really a statute of limitations.

That is indeed the correct characterization. Any truly "jurisdictional" time limit can never be extended, while statutes of limitations are subject to waiver, estoppel and equitable tolling. See, *e.g.*, *Zipes v. TWA, Inc.*, 455 U.S. 385, 392-93 (1982) (making precisely that distinction for Title VII cases).

By similarly characterizing ARA ¶ 3-103 as "mandatory and not jurisdictional," the Illinois Supreme Court has not once but twice specifically excused a failure to comply with its timetable where a diligent attempt at compliance was shown (*Cox v. Board of Fire and Police Commissioners of the City of Danville*, 96 Ill.2d 399, 404, 451 N.E.2d 842, 844 (1983); *City National Bank & Trust Co. v. Property Tax Appeal Board*, 97 Ill.2d 378, 381-82, 454 N.E.2d 652, 654-55 (1983)). *Cox* and *City National* plainly show the Illinois Supreme Court treats ARA ¶ 3-103 as a statute of

limitations rather than a jurisdictional limitation. After the Opinion's consistently accurate description of ARA ¶ 3-103 in those terms, its final passing reference to "jurisdiction" was simply careless usage. In fact that locution followed immediately after the Opinion's references to "a good faith effort" and being "diligent" in obtaining issuance of the summonses – concepts that would have no place at all in a jurisdictional rule.

Splitting that hair does not of itself tell us what difference lies in the distinction. Though the practical difference to those who miss the deadline is obvious, neither characterization gets litigants any closer to the "merits" in substantive terms. Once Bank failed to show an entitlement to equitable tolling, dismissal followed without the Opinion's having to touch the substantive administrative-law issues.

Some courts have looked to that factor and said limitations dismissals are not "on the merits" for res judicata purposes (see, *e.g.*, *Santucci Construction Co. v. Metropolitan Sanitary District of Greater Chicago*, 55 Ill.App.3d 376, 379, 371 N.E.2d 53, 55 (1st Dist. 1977) (characterizing limitations dismissals as "procedural" only)). But as this Court's colleague Judge Susan Getzendanner has accurately pointed out in *Chang v. Northwestern Memorial Hospital*, 549 F. Supp. 90, 94-95 (N.D.Ill.1982), that approach ignores the unambiquous directive of Ill.Rev.Stat. ch. 110A, ¶ 273 ("Rule 273"[12]):

> Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

Limitations dismissals are notably absent from Rule

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[12] Chapter 110A contains the Illinois Supreme Court Rules.

273's list of exceptions. *Chang*, 549 F.Supp. at 95 therefore held such dismissals are "on the merits" for res judicata purposes. Accord, *Muscare v. Voltz*, 107 Ill.App.3d 841, 843, 438 N.E.2d 620, 622 (1st Dist.1982) (dismissal under statutory limitations period for suits against Chicago Transit Authority is "on the merits" under Rule 273 and creates a res judicata bar).

Muscare drew a further distinction: Even conceding most limitations dismissals would be only "procedural" in the absence of Rule 273, the court added (107 Ill.App.3d at 843, 438 N.E.2d at 622) (citations omitted):

> A special limitation, on the other hand, may be contained within a statute that creates rights unknown to common law.... The limitation thus fixes a time within which the action may be commenced and is more than a remedial restriction. In such an instance, the time limitations in statutory causes of action are considered a condition of the liability itself and not one of remedy only.

That analysis suggests it really doesn't matter whether a statutory time limit is called jurisdictional or a statute of limitations, so long as it acts to define the scope of a statutory right. In either instance dismissal would be "on the merits" because the right to relief is extinguished. See 1B *Moore's Federal Practice* ¶ 0.409[6], at 334-35 (2d ed. 1984). Often it is possible to say a statute of limitations bars a remedy only and not a right (see *id.* at 335-36). In much the same way, jurisdictional dismissals are frequently without prejudice to refiling in a court of competent jurisdiction.[13]

But that is not so, as *Muscare* teaches, when the exercise of a right is conditioned on compliance with a time

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[13] That is the familiar effect of federal court dismissals for lack of subject matter jurisdiction (*e.g.*, where diversity of citizenship or the $10,000 amount in controversy is wanting).

schedule. Cf. *Phillips v. Elrod*, 135 Ill.App.3d 70, 74, 478 N.E.2d 1078, 1082 (1st Dist.1985) (compliance with wrongful death statute of limitations "is a condition of the right to sue itself"). Thus the right to challenge an Illinois administrative determination is conditioned on compliance with ARA ¶ 3-103. Repleading or filing in another forum cannot cure that problem. And even if some statute-of-limitations dismissals might perhaps under Illinois law escape the impact of Rule 273 (a doubtful proposition for the reason already discussed), this is not one of them, for the right to complain (not just the right to a particular remedy) is extinguished.

Under Rule 273 it is really irrelevant that limitations dismissals are not accompanied by an airing of the "merits" in the usual sense of that term. After all, Rule 273's carefully-worded terminology ("*operates as* an adjudication on the merits") tells just which dismissals shall be given the same effect as a valid adjudication of the merits, even though the merits have *not* been addressed in fact. See, *e.g.*, *Towns v. Yellow Cab Co.*, 73 Ill.2d 113, 122, 382 N.E.2d 1217, 1221 (1978) (under Rule 273 a dismissal for failure to cooperate in discovery is "on the merits"). Put another way, Rule 273 defines the policy Illinois courts must follow in claim-preclusion analyses. No Illinois court could undertake re-examination of the Property's zoning on any ground.

That means this federal court cannot do so either. *Migra*, 465 U.S. at 85, teaches Section 1738 requires federal courts to give state-court judgments the same preclusive effect (no more and no less) they would have in the courts of the rendering state.

Bank and Paxton say even if that analysis is correct as to Illinois law, applying it here would conflict with federal policy as expressed in Section 1983. They are wrong. While at one time it was possible to argue federal courts were required to apply res judicata principles

to state judgments only where there had been a "full and fair hearing in a state court" (*Allen*, 449 U.S. at 101), that proposition was soundly rejected in *Migra*, 465 U.S. at 83-85. There the Court held Section 1983 did not modify the Section 1738 directive to accord state judgments whatever res judicata effect they would have in state court, whether preclusion was based on issues actually litigated or on those that could have been but were not. Where Section 1738 is in the picture, Section 1983 does not guarantee a federal forum.

Bank and Paxton press the further argument that ARA ¶ 3-103 effectively establishes a 35-day statute of limitations for Section 1983 cases. For Illinois-based Section 1983 actions, the limitations period is five years (*Shorters v. City of Chicago*, 617 F.Supp. 661, 666 (N.D.Ill.1985).[14]). *Burnett v. Grattan*, 104 S.Ct. 2924, 2930-33 (1984) held the federal policies expressed by Section 1983 did not permit borrowing a state's six-month administrative statute of limitations pursuant to 42 U.S.C. § 1988 ("Section 1988").[15]

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[14] Plaintiffs Mem. 18 points to *Anton v. Lehpamer*, (7th Cir. 1986), which speaks of Illinois' two-year personal injury statute as applicable to Section 1983 actions. Because plaintiffs' argument discussed in the text lacks merit in any event, the two-versus-five-year issue drops out. Nevertheless for clarity's sake it must be pointed out that question was neither argued nor considered in *Anton*, which simply assumed without analysis that Illinois' two-year personal injury statute was the appropriate choice under *Wilson v. Garcia*, 105 S.Ct. 1938, 1947-49 (1985). Until such time as our Court of Appeals actually examines and decides the issue posed in *Shorters*, this Court sees no reason to reexamine its holding in that case.

[15] Section 1983 does not contain its own statute of limitations. Section 1988 directs federal courts to look to state law "so far as the same is not inconsistent with the Constitution and laws of the United States" to find one. See *Wilson*, 105 S.Ct. at 1942-49.

Although much of *Burnett* may have been superseded by *Wilson*, it would still be inappropriate to borrow a 35-day statute of limitations for filing Section 1983 actions. However, two reasons – each independent of the other and each fully dispositive – demonstrate the emptiness of plaintiffs' argument in this area.

First, the truly short answer is – as *Migra* establishes – nothing in Section 1983 overrides the congressional policy expressed in Section 1738. Conqress' mandate to accord full faith and credit to state-court decisions places a limit on the availability of a federal forum under Section 1983 (*Migra*, 465 U.S. at 84). To the extent plaintiffs' argument says Section 1983 is somehow "stronger" than Section 1738,[16] that is simply wrong.

Second, the entire issue is really a red herring. From the start plaintiffs have been in control of their own litigation. They decided when to bring the original declaratory judgment action and when to seek zoning relief from Board. Once Board turned them down, nothing stopped them from asserting their constitutional claims in the Circuit Court as they should have done. Especially given the fact they do not challenge the procedural adequacy of Illinois' zoning machinery, they cannot fairly portray their constitutional claims as distinct from their general claim of entitlement to a special-use variance: Properly presented to the Circuit Court, those claims would simply have been additional grounds for overruling Board's Resolution.

Plaintiffs neglected to make their constitutional

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[16] Section 1738, after all, implements the federal counterpart of a constitutional mandate: the Full Faith and Credit Clause. Section 1983 embodies post-Civil War principles that were later built into the Constitution via amendment. To "rank" those congressional enactments in terms of their relative importance, or in terms of their order of enactment (see *Migra*, 465 U.S. at 83-85), is a bootless effort.

arguments in the first available judicial forum (the Circuit Court). Now they try to turn their own delinquency into an asset by urging a more extended time clock for a claimed Section 1983 cause of action in this Court – a cause of action created by that very delinquency. That represents an impermissible kind of bootstrapping.[17]

Thus plaintiffs' final contention, like all their others, lacks merit. Plaintiffs cannot escape the fact they seek to advance in this Court matters they could – and should – have asserted in their state court lawsuit. That calls into play both the letter and the spirit of res judicata principles.

Conclusion

All plaintiffs' claims are barred by res judicata doctrine. That conclusion makes it unnecessary to reach defendants' arguments going to the merits of those claims. This action is dismissed.

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[17] This does not amount to an impermissible state-remedies exhaustion requirement (see generally *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982)). Plaintiffs could have ignored Illinois' administrative review process entirely and brought their claim for damages directly to federal court under Section 1983. But plaintiffs have not displayed (let alone invoked) the distrust of state procedures lying behind Section 1983's no-exhaustion rule (*Patsy*, 457 U.S. at 505) – a distrust *Migra*, 465 U.S. at 84, rejected in the res judicata context. Instead they specifically opted to use the Illinois courts – but then chose to assert only part of their claim there. To say a litigant need not exhaust state remedies before suing under Section 1983 in federal court is to say litigants have an either/or choice of forums. But litigants may not knock on the door of a federal court to assert the neglected portion of their cause of action, when their very neglect to plead their *whole* cause of action in the state court has allowed that court's door to lock shut.

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT (3RD DIVISION)

AMERICAN NATIONAL BANK & TRUST CO., Trustee,
Plaintiff-Appellee,

vs.

THE CITY OF CHICAGO,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County;

The Honorable **James C. Murray,** Judge, Presiding.

No. 84-2153

132 Ill. App. 3d 570; 478 N.E.2d 1; 87 Ill. Dec. 862
March 20, 1985.

COUNSEL:

James D. Montgomery, Corporation Counsel, of Chicago (Philip L. Bronstein and Julie Elena Brown, Assistant Corporation Counsel, of counsel), for appellant.

Allegretti, Newitt, Witcoff & McAndrews, Ltd., and Murphy, Mitchell & Jaffe, both of Chicago (George P. McAndrews, Charles W. Shifley, Robert C. Ryan, Thomas J. Murphy, and John F. Fennig, of counsel), for appellee.

PRESIDING JUSTICE WHITE delivered the opinion of the court:

On June 1, 1983, plaintiff, American National Bank & Trust Co. (bank), as trustee under trust No. 33832, filed an application with the Chicago Zoning Board of Appeals (zoning board) for a special-use variance for the purpose of operating a sanitary landfill. By letter dated June 24, 1983, the department of planning of the city of Chicago voiced objections to plaintiff's application on the ground that a substantial portion of the proposed landfill site contained public rights-of-way owned by the city. Thereafter, the bank commenced this declaratory judgment action to quiet title to the land, naming the city of Chicago (city) as defendant.

Prior to resolution of the declaratory judgment action,

the zoning board held a hearing[1] on the bank's application at which several residents of a community near the proposed site appeared and testified against approval of the bank's application. The zoning board denied the bank's application and mailed notice thereof to the bank on March 8, 1984. On March 22, 1984, the bank amended the complaint for declaratory judgment to add a count seeking administrative review of the decision of the zoning board, and a count seeking a mandate that the department of consumed services of the city of Chicago grant it a permit to operate the landfill. On April 10, 1984, the city filed a motion to dismiss the count for administrative review, alleging as basis for the motion that the bank failed to name and serve certain parties as required by the Administrative Review Law (Ill. Rev. Stat. 1983, ch. 110, par. 3 – 101 *et seq.*.) In response to the city's motion the bank, on April 11, 1984, served summonses on the zoning board and on the department of consumer services. On April 16, 1984, the court denied the city's motion to dismiss and allowed the bank to amend its complaint to name the zoning board, the department of consumer services, and the community residents who appeared at the administrative hearing as defendants. Summonses were issued to the community residents on April 17, 1984. Thereafter the bank filed a motion for summary judgment which was granted as to the administrative review count of the complaint. The circuit court reversed the resolution of the zoning board with instructions to issue the special-use variation which the bank sought should the application conform to all ordinances. The city appeals.

On appeal it contends, *inter alia*, that the circuit court lacked subject matter jurisdiction because of the bank's failure to procure issuance of summonses to all parties

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[1]The hearing was held upon request of the circuit court of Cook County.

within the 35-day time period prescribed in section 3 – 103 of the Administrative Review Law (Ill. Rev. Stat. 1983, ch. 110, par. 3 – 103).

> Section 3 – 103 of the Administrative Review Law provides:
>
> "Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby."

(Ill. Rev. Stat. 1983, ch. 110, par. 3 – 103.) Further, section 3 – 107 of the Administrative Review Law provides:

> "In any action to review any final decision of an administrative agency, the administrative agency and all persons, other than the plaintiff, who were parties of record to the proceedings before the administrative agency shall be made defendants."

(Ill. Rev. Stat. 1983, ch. 110, par. 3 – 107.) The 35-day period for issuance of summons is mandatory and not jurisdictional, and failure to secure issuance of summons within the period will not preclude judicial review. (*City National Bank & Trust Co. v. Property Tax Appeal Board* (1983), 97 Ill. 2d 378, 454 N.E.2d 652; *Cox v. Board of Fire & Police Commissioners* (1983), 96 Ill. 2d 399, 451 N.E.2d 842.) However, the 35-day period is intended to insure that the plaintiff cannot unduly delay review *(City National Bank & Trust Co. v. Property Tax Appeal Board* (1982), 108 Ill. App. 3d 979, 439 N.E.2d 1301, *affirmed* (1983), 97 Ill. 2d 378, 454 N.E.2d 652), and the plaintiff must show a good-faith effort to have the clerk issue the summons within the 35 days to warrant relaxation of the filing period. *Moretti v. Department of Labor* (1983), 119 Ill. App. 3d 740, 457 N.E.2d 114.

In the case at bar, the bank failed to act with diligence to procure issuance of the summonses. On April 10, 1984, 33 days after the bank was served notice of

the zoning board's resolution, the city filed a motion to dismiss that portion of the complaint seeking administrative review based upon the bank's failure to comply with sections 3 – 103 and 3 – 107 of the Administrative Review Law. The bank obtained service of summons on the zoning board and the department of consumer services the next day. These summonses were timely. However, the bank neglected to have summonses issued to four community residents who were parties of record to the proceedings before the zoning board until April 17, 1984, 40 days after it was served notice of the zoning board's resolution. The bank's excuse for the late issuance of summonses to the community residents is that the city did not object to lack summonses to the community objectors until the April 16, 1984, hearing on the city's motion to dismiss. We note first that the burden was squarely upon the bank to name and serve all persons who were parties of record to the proceedings before the zoning board (*Winston v. Zoning Board of Appeals* (1950), 407 Ill. 588, 95 N.E.2d 864; *Moretti v. Department of Labor* (1983), 119 Ill. App. 3d 740, 457 N.E.2d 114; *Lewis v. Trainor* (1977), 51 Ill. App. 3d 180, 366 N.E.2d 579), and second, that the city's motion to dismiss cited the pertinent sections of the Administrative Review Law and thus put the bank on notice that summonses should be served the four community objectors.

We conclude that the bank was not diligent in obtaining issuance of the summonses and that the circuit court erred in denying the city's motion to dismiss.

In light of our conclusion that the circuit court lacked jurisdiction to review the resolution of the zoning board, we need not consider the city's other contentions.

For the aforementioned reasons the judgment of the circuit court of Cook County is reversed.

REVERSED

McGILLICUDDY and RIZZI, JJ., concur.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

AMERICAN NATL. BK. V/T/#33832

v.

CITY, etc. et al.

No. 83L53087

ORDER

This matter coming on pursuant to order of 7/26/84 it is ordered:

1) City's motion to reconsider order of 7/18/84 denied

2) Plaintiff's motion to reconsider granted in part & denied in part as follows: order of 7/18/84 amended to include

A) That title be quieted in plaintiff

B) That city has no present right, title, and interest in streets and alleys in question and is precluded from asserting same in connection with this complaint.

3) Plaintiff is granted summary judgement as to count IV, the zoning board of appeals is reversed and this is remanded with instructions to issue the resolution for variation in the nature of a special use, if otherwise entitled, i.e. conforms to all ordinances.

4) Count V is dismissed as premature.

5) Court has jurisdiction. This is a final, appealable order.

Atty No.: 91142
Name: Thomas Murphy, George McAndrews
Attorney for: Plaintiff
Address: 179 W. Washington
Telephone: 750-9260

July 31 1984, 19____

ENTER:

/s/ JAMES C. MURRAY 857
Judge Judge's No.

MORGAN M. FINLEY,
CLERK OF THE CIRCUIT COURT OF COOK COUNTY

United States Constitution

AMENDMENT V – CAPITAL CRIMES; DOUBLE JEOPARDY: SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution

AMENDMENT XIV. – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of

the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title 28, United States Code

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

Title 42, United States Code

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Title 42, United States Code

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

Supreme Court Rules of Practice

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Ill. Rev. Stat., ch. 110, section 3-103.

3-103. Commencement of action

§ 3-103. Commencement of action. Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby. The method of service of the decision shall be as provided in the Act governing the procedure before the administrative agency, but if no method is provided, a decision shall be deemed to have been served either when personally delivered or when deposited in the United States mail, in a sealed envelope or package, with postage prepaid, addressed to the party affected thereby at his or her last know residence or place of business.

The form of the summons and issuance of alias summons shall be according to rules of the Supreme Court.

P.A. 82-280, § 3-103, eff. July 1, 1982.

No. 87-629

Supreme Court, U.S.
FILED
NOV 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN NATIONAL BANK & TRUST COMPANY, not individually, but solely as Trustee under Trust Number 33832, and PAXTON LANDFILL CORPORATION, an Illinois corporation,

Petitioners,

vs.

CITY OF CHICAGO, a municipal corporation, and ZONING BOARD OF APPEALS FOR THE CITY OF CHICAGO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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November 12, 1987

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's federal action is barred, under the principle of *res judicata*, by the decision of the Illinois Appellate Court concerning the same claim where Illinois law would bar a subsequent state action.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	3
A.	
THE COURT OF APPEALS CORRECTLY APPLIED ILLINOIS LAW IN DETERMINING THAT THE DECISION OF THE ILLINOIS APPELLATE COURT WAS A FINAL JUDGMENT ON THE MERITS	4
B.	
NO EXCEPTION TO APPLICATION OF THE PRINCIPLE OF *RES JUDICATA* IS WARRANTED HERE BECAUSE PAXTON HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE ALL OF ITS CLAIMS IN STATE COURT, BUT FAILED TO PROPERLY DO SO	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	PAGE
Anton v. Lephamer, 787 F.2d 1141 (7th Cir. 1986)	8
Board of Education v. Adelman, 137 Ill. App. 3d 965 (1985)	6
Builders Plumbing Supply Co. v. Zambetta, 143 Ill. App. 3d 188 (1986)	4
Cannon v. Loyola University of Chicago, 609 F. Supp. 1010 (N.D. Ill. 1985)	9
City National Bank and Trust Co. v. Property Tax Appeal Board, 97 Ill. 2d 378 (1983)	5, 6
Cox v. Board of Police & Fire Commissioners, 96 Ill. 2d 399 (1983)	5, 6
Fredman Brothers Furniture Co. v. Department of Revenue, 109 Ill. 2d 202 (1985)	6
Housing Authority v. YMCA, 101 Ill. 2d 246 (1984)	4
Howard v. Lawton, 22 Ill. 2d 331 (1961)	8
Kremer v. Chemical Construction Co., 456 U.S. 461 (1982)	8
Migra v. Warren City School District, 465 U.S. 75 (1984)	4
Moretti v. Dept. of Labor, 119 Ill. App. 3d 740 (1983)	5, 6
Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983)	9
O'Hare International Bank v. Zoning Board of Appeals, 37 Ill. App. 3d 1037 (1976)	6, 7
Ossler v. Village of Norridge, 557 F. Supp. 219 (N.D. Ill. 1983)	8
Wilson v. Garcia, 471 U.S. 261 (1985)	8

Other Authorities

28 U.S.C. § 1738 ..... 4, 7
42 U.S.C. § 1983 ..... 7, 8
Ill. Rev. Stat. 1975, ch. 83, par. 24a 7
Ill. Rev. Stat. 1983, ch. 110, sec. 3-103 5
Ill. Rev. Stat. 1983, ch. 110, sec. 3-107 5
Ill. Rev. Stat. 1983, ch. 110A, Rule 273 ..... 5, 6

No. 87-629

IN THE

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OCTOBER TERM, 1987

AMERICAN NATIONAL BANK & TRUST COMPANY, not individually, but solely as Trustee under Trust Number 33832, and PAXTON LANDFILL CORPORATION, an Illinois corporation,

Petitioners,

VS.

CITY OF CHICAGO, a municipal corporation, and ZONING BOARD OF APPEALS FOR THE CITY OF CHICAGO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On June 1, 1983, the petitioner, Paxton Landfill Corporation ("Paxton"), filed an application with the Chicago Zoning Board of Appeals ("Board") for a special use variance for an area encompassing two adjacent landfill sites, called Paxton I and Paxton II. During the application pro-

ceedings, the City of Chicago contested the ownership of certain portions of the site. Paxton filed a state court declaratory judgment action on December 6, 1984, to quiet title. The quiet title action was subsequently resolved in Paxton's favor and is not at issue here.

While the quiet title action was pending, the Board, at the request of the state trial court, held a hearing on Paxton's application for the special use zoning variance. At the hearing, objectors from the community appeared, testified and were represented by counsel. The Board denied Paxton's application.

On March 8, 1984, notice of the Board's decision was mailed to Paxton. On March 22, Paxton amended its declaratory judgment complaint, seeking, *inter alia*, administrative review of the Board's decision. On April 10, the City moved to dismiss the administrative review portion of the complaint because Paxton had failed to name and serve the proper agencies and the community objectors, as required by the Illinois Administrative Review Act. Ill. Rev. Stat. 1983, ch. 110, sec. 3-103. In response to that motion, Paxton served summons the next day on the Board, but not on the objectors. Summons was issued to the objectors on April 17, forty days after notice to Paxton of the Board's decision. The trial court denied the City's motion to dismiss.

On July 31, the trial court granted Paxton's motion for summary judgment and remanded the cause to the Board with instructions to "issue the resolution for Variation in the Nature of a Special Use, if otherwise entitled, i.e. conforms to all ordinances."

The City appealed the reversal of the Board's decision to deny the variance. The appellate court reversed the trial court, holding that the trial court erred in failing to

grant the City's motion to dismiss. It found that Paxton failed to act with due diligence in obtaining issuance of summons to the objectors, and therefore failed to comply with the mandatory requirements of the Administrative Review Act. 132 Ill. App. 3d 570, 593 (1985). The Illinois Supreme Court denied leave to appeal, thus making the appellate court's decision final and permanently reinstating the Board's original denial.

Paxton next filed this suit in federal district court under several provisions of the federal and state constitution, requesting, for the first-time, damages for the Board's denial of the variance, and challenging for the first time the constitutionality of the zoning classification of the subject property. The district court granted the City's motion to dismiss the complaint on the ground that Paxton's federal claims are barred by the doctrine of *res judicata*. 636 F. Supp. 374 (N.D. Ill. 1986). The United States Court of Appeals for the Seventh Circuit affirmed, and Paxton now seeks a *writ of certiorari* to review that decision.

ARGUMENT

The decisions of the court of appeals and the district court in this case finding Paxton's federal claims barred by the doctrine of *res judicata* are fully consistent with Illinois and federal claim preclusion law and therefore do not warrant review by this Court. Furthermore, this case does not fit, as Paxton claims, within the narrow exception alluded to by this Court as applying to cases in which the plaintiff was denied a full and fair opportunity to raise its constitutional theories in state court. Paxton could have raised its constitutional challenge in the state court pro-

ceeding, but failed to do so. Moreover, Paxton's dire predictions as to the effect of this case on anyone other than itself are baseless. Paxton's only problem here is its own failure to comply with simple but mandatory state court procedures. This case therefore does not warrant exercise of this Court's supervisory power.

A.

THE COURT OF APPEALS CORRECTLY APPLIED ILLINOIS LAW IN DETERMINING THAT THE DECISION OF THE ILLINOIS APPELLATE COURT WAS A FINAL JUDGMENT ON THE MERITS.

Federal law requires that federal courts give to a state court judgment the same preclusive effect the judgment would be given under the law of the state that rendered it. 28 U.S.C. § 1738; *Migra v. Warren City School District*, 465 U.S. 75 (1984). The only question in this case, therefore, is whether the judgment of the Illinois Appellate Court in Paxton's prior state action bars this federal action. The court of appeals and the district court correctly determined that it does.

The Illinois doctrine of *res judicata* provides:

> a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

Builders Plumbing Supply Co. v. Zambetta, 143 Ill. App. 3d 188, 191 (1986), *quoting Housing Authority v. YMCA*, 101 Ill. 2d 246, 251 (1984). In its petition Paxton disputes that the judgment of the Illinois Appellate Court was final and on the merits. Paxton's contentions are contrary to Illinois law.

The Illinois Appellate Court held that Paxton's administrative review proceeding should have been dismissed because Paxton failed to have summons issued to all proper parties* within 35 days, as required by the Illinois Administrative Review Act (Ill. Rev. Stat. 1983, ch. 110, §§ 3-103, 3-107). Under Illinois law, the appellate court's decision "operates as an adjudication upon the merits." Ill. Rev. Stat. 1983, ch. 110A, Supreme Court Rule 273. Rule 273 provides:

> Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

Contrary to Paxton's argument, the Illinois Supreme Court has determined that the requirement that summons issue in an administrative review proceeding within 35 days is mandatory and not jurisdictional. *City National Bank and Trust Co. v. Property Tax Appeal Board*, 92 Ill. 2d 378, 382 (1983); *Cox v. Board of Police & Fire Commissioners*, 96 Ill. 2d 402, 403-04 (1983). Failure to comply with the rule is not an absolute bar to bringing suit; rather, a plaintiff must show diligence in attempting to comply with the requirement, or the administrative review action may properly be dismissed. *See City National Bank*, 97 Ill. 2d at 382; *Cox*, 96 Ill. 2d at 404; *see also, Moretti v. Dept. of Labor*, 119 Ill. App. 3d 740 (1983).

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* Paxton refers to the objectors as witnesses (Petition at 6), however, under the Illinois Administrative Review Act "all persons, other than the plaintiff, who were parties of record . . . shall be made defendants." Ill. Rev. Stat. 1985, ch. 110, sec. 3-107. The objectors were parties of record at the Board hearing, and therefore should have been made defendants.

In Paxton's state proceeding, the Illinois Appellate Court followed precisely the holdings of *Cox* and *City National Bank* that the 35-day requirement was mandatory and found that "the bank failed to act with diligence to procure issuance of the summonses." 132 Ill. App. 3d at 572. Under *Cox* and *City National Bank*, dismissal on that ground was not jurisdictional. The appellate court's reference to jurisdiction (132 Ill. App. 3d at 573), relied upon by Paxton in its petition, was properly characterized by the district court as "simply careless usage." 636 F. Supp. at 381. Thus, under Illinois Supreme Court Rule 273, the state judgment operates as an adjudication on the merits and bars subsequent litigation of the same claim.

Paxton erroneously relies on *Fredman Brothers Furniture Co. v. Department of Revenue*, 109 Ill. 2d 202 (1985), to support its contention that the dismissal was jurisdictional. *Fredman* involved the Illinois Administrative Review Act requirement that a complaint be filed within 35 days; it does not discuss the 35-day service requirement. Under Illinois law, filing and service are two separate and distinct requirements. While timely filing of a complaint is jurisdictional "and a one-day delay in filing will bar relief," *Board of Education v. Adelman*, 137 Ill. App. 3d 965, 970 (1985), timely issuance of summons is mandatory, and plaintiff must show due diligence. *Cox*, 96 Ill. 2d 402; *City National Bank*, 92 Ill. 2d 378; *Moretti*, 119 Ill. App. 3d 740. Thus, *Fredman* is not relevant.

Paxton's reliance on *O'Hare International Bank v. Zoning Board of Appeals*, 37 Ill. App. 3d 1037 (1976), is also totally misplaced. As the Court of Appeals correctly observed, the *O'Hare* case discusses neither principles of claim preclusion nor the proper interpretation of section 3-103 of the Administrative Review Act (Slip op. at 18).

O'Hare held only that under the Illinois statute which specifically allows refiling of an action within one year of the reversal of a favorable judgment, the plaintiff could refile its action. *See* Ill. Rev. Stat. 1975, ch. 83, par. 24a. Paxton never attempted to refile its case pursuant to that statute. *O'Hare* therefore has no application here.

Thus, the district court was correct in finding that under Illinois law the 35-day requirement for issuance of summons is mandatory and not jurisdictional, and the court of appeals correctly agreed. The Illinois Appellate Court's decision in this matter was final and on the merits, and thus operates as a bar to the instant action.

B.

NO EXCEPTION TO APPLICATION OF THE PRINCIPLE OF *RES JUDICATA* IS WARRANTED HERE BECAUSE PAXTON HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE ALL OF ITS CLAIMS IN STATE COURT, BUT FAILED TO PROPERLY DO SO.

Paxton argued that this Court should apply a narrow exception to the application of 28 U.S.C. § 1738 and the principles of *res judicata* because, it argues, Illinois did not provide it a full and fair opportunity to litigate its constitutional claims. While this Court has alluded to the possibility that such an exception might apply in some section 1983 actions, this case warrants no such treatment. Illinois clearly provided Paxton the opportunity to litigate all of its claims. Paxton, however, failed to avail itself of that opportunity. Paxton never attempted to raise its constitutional claims in state court. Further, Paxton's federal complaint did not challenge on due process grounds the state court procedures it now claims are unfair.

There is no question that Illinois law allows constitutional issues to be raised in an administrative review proceeding. *Howard v. Lawton*, 22 Ill. 2d 331 (1961). Furthermore, state courts have concurrent jurisdiction over section 1983 claims. *See Ossler v. Village of Norridge*, 557 F. Supp. 219, 222 n.2 (N.D. Ill. 1983). The fact that despite the opportunity to do so Paxton failed to raise its constitutional claims in state court and to follow state court procedures does not remove the *res judicata* bar to this suit. It was only because of Paxton's own lack of diligence that it did not make full use of the available state court procedures, and that failure is not actionable. *See Kremer v. Chemical Construction Co.*, 456 U.S. 461, 485 (1982).

Paxton also argues that the administrative review procedures create an unfair 35-day statute of limitations for section 1983 claims, and cites numerous cases rejecting short statutes of limitations as appropriate borrowing statutes for section 1983. In so doing, Paxton attempts to mislead this Court entirely as to the effect of the decisions below. The question in this case is not which state statute to borrow as the statute of limitations for initiating section 1983 actions. That question was settled by this Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), and pursuant to *Wilson*, the statute of limitations in Illinois for section 1983 actions is two years. *See Anton v. Lephamer*, 787 F.2d 1141 (7th Cir. 1986). The question in this case is whether Paxton's federal action is barred by the doctrine of *res judicata* where its state court action was dismissed after Paxton's own failure to follow mandatory service requirements. Paxton has failed to cite a single case addressing this question. The cases relied on by Paxton concerning the time limit for the initiation of a section 1983 action are all inapposite.

A claim barred by the running of the statute of limitations is *res judicata* not only as to the time-barred claim, but also as to all other claims which could have been raised in the initial suit. *See Nilsen v. City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983); *Cannon v. Loyola University of Chicago*, 609 F. Supp. 1010, 1016 (N.D. Ill. 1985). Paxton had a full and fair opportunity to raise all of its constitutional claims in the state court proceeding, just as its count in administrative review was appended to its original quiet title action. Further, the constitutional claims need not have been filed within 35 days, but could have been filed at any time up to the two-year statute of limitations providing Paxton had a live pending action. Because Paxton had the opportunity, but chose not to raise its constitutional claims in its prior state court action, Paxton is now barred from relitigating its claim under a new theory in federal court. Paxton's problem, as the court of appeals noted, was that it failed to appreciate the requirements of the state statute, even after the City alerted it to the problem by the motion to dismiss filed with two days left to run on the 35-day service requirement (Slip op. at 6). Paxton's lack of diligence does not provide it with a new federal cause of action.

CONCLUSION

Because the decision of the Court of Appeals finding Paxton's action barred by *res judicata* is consistent with Illinois and federal claim preclusion law, and because this

case does not warrant exceptional treatment, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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November 12, 1987

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No. 87-629

Supreme Court, U.S.
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In The
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AMERICAN NATIONAL BANK & TRUST COMPANY, not individually, but solely as Trustee under Trust Number 33832, and PAXTON LANDFILL CORPORATION, an Illinois corporation,

Petitioners,

v.

CITY OF CHICAGO, a municipal Illinois corporation, and ZONING BOARD OF APPEALS FOR THE CITY OF CHICAGO,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent's Brief In Opposition is revealing, and proves all central points of the petition for writ of certiorari.

Petitioner ("Paxton") asserted the decision for which review is sought would deprive all Illinois citizens[1], who suffered loss of federal Constitutional rights in state administrative proceedings, of their Constitutional rights, unless action for administrative review was brought flawlessly in 35 days. Respondent brands the assertion "baseless", but reveals Paxton could have brought its action for vindication of its federal Constitutional rights after 35 days only "providing it [Paxton] had a live pending action."[2]

Petitioner asserted the decision for which review is sought is in conflict with applicable decisions of the United States Supreme Court and other federal courts of appeals, which support an exception that state law cannot govern under 28 U.S.C. Section 1738 where inconsistent with 42 U.S.C. Section 1983. Respondent argues no exception applies here, because Paxton had "full and fair opportunity" to litigate, but Respondent reveals that the dismissal of Paxton's action was ordered over a technicality of service requirements which could be satisfied within 35 days only, and that the dismissal has been held to be res judicata.[3]

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[1] And all citizens of the fifty states with similar laws.

[2] Compare Respondent's Brief at 4, lines 1-3, to its brief at 9, lines 10-13. Presumably, a "live pending action" is an action for administrative review, brought flawlessly, within 35 days, so as to be "live" and "pending".

[3] Compare Respondent's Brief at 7-8 to its brief at 5, lines 1-6. The opportunity to date has been neither "full" nor "fair".

Petitioner asserted the state appeals court decision was a decision of jurisdiction and not res judicata, as a matter of state law. Petitioner asserted the Seventh Circuit decision was a decision not of state law, but in spite of state law. Repondent argues the state courts would have treated the state court dismissal as res judicata,[4] as did the Seventh Circuit, but reveals that Illinois state courts

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[4] Respondent argues failure of service was a "mandatory" flaw, not a jurisdictional flaw. The statue underlying the petition and decisions below is Ill. Rev. Stat., ch. 110, section 3-103. Section 3-103 provides:

> Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby.

This statute requires that: (1) the *plaintiff* must file the review and all summonses within the 35-day period; and (2) the *clerk of the court* must then issue the summonses as filed, also within the 35-day period. The first requirement is the *mode of procedure* the *plaintiff* must pursue; the second, issuance of summonses after filing by plaintiff, is the *clerk's* obligation.

Repondent cites two cases, *City National Bank and Trust Co. v. Property Tax Appeal Board,* 92 Ill. 2d 378, 382 (1983); and *Cox v. Board of Police & Fire Commissioners,* 96 Ill. 2d 402, 403-04 (1983) for the proposition that failure of service is a "mandatory", not jurisdictional, flaw. Respondent confuses the first and second requirements of the statute.

In *City National* and *Cox*, the Illinois Supreme Court held that the second requirement, the *clerk's* issuance of summonses, is mandatory, not jurisdictional. Thus, failure of the *clerk's* obligation, because it is outside the plaintiff's control, can be overcome. *Id.*

But in *Fredman Brothers Furniture Co. v. Department of Revenue,* 109 Ill. 2d 202, 209-11, 486 N.E.2d 893, 895-96 (1985), the Illinois Supreme Court held the first requirement, *plaintiff's* mode of procedure, is jurisdictional. Quoting, "if the *mode of procedure* prescribed . . . is not strictly pursued, no jurisdiction is conferred on the [Illinois trial] court." *Id.* at 210, 486 N.E.2d at 896 (emphasis supplied).

would have allowed Paxton's action to have been refiled in state court up to a year later.

Paxton's Constitutional claims have never been heard on the merits in any court, state or federal. The decisions of the federal courts in refusing to hear the claims have been damaging to Paxton, to federal Constitutional rights, and to federal jurisprudence. Respectfully, the petition for writ of certiorari should be granted.

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